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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1944

No. 45

BESTER WILLIAM STEELE, PETITIONER,

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALABAMA

PETITION FOR CERTIORARI FILED MARCH 29, 1943.

CERTIORARI GRANTED MAY 29, 1944.

SUPREME COURT OF THE UNITED STATES

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALABAMA

INDEX

	Original	Print
Record from Circuit Court of Jefferson County, Alabama	2	1
Certificate of appeal	2	1
Organization of court (omitted in printing)	5	
Original bill	5	3
Exhibit "1"—Agreement dated February 18, 1941, between The Southeastern Carriers' Conference Committee and the Brotherhood of Locomotive Firemen and Enginemen	13	10
Exhibit "2"—Agreement in connection with application on the L. & N. Railroad of Agreement between the Southeastern Carriers Conference and the Brotherhood of Locomotive Firemen and Enginemen, dated February 18, 1941	16	13
Demurrer of respondent L. & N. R. R. Company	24	21
Plea in abatement by respondent Brotherhood	30	27
Minute entry of submission of plea in abatement	32	29

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 29, 1944.

	Original	Print
Record from Circuit Court of Jefferson County, Alabama—Continued		
Decree holding plea in abatement insufficient	32	29
Demurrer of L. & N. R. R. Company	33	30
Amendment to plea in abatement by Brotherhood	37	34
Demurrer of Brotherhood	38	35
Minute entry of submission of demurrers and amended plea in abatement	50	48
Decree sustaining demurrers	50	48
Decree holding plea in abatement (as amended) insufficient	50	48
Order extending time to amend complaint	51	49
Amended complaint	51	49
Exhibit "A"—Letter, dated March 28, 1940 from General Chairman addressed to "Dear Sir"	61	59
Demurrer of L. & N. R. R. Co., refiled to bill as last amended	63	61
Demurrer of Brotherhood to amended bill	63	61
Minute entry on submission of demurrers	78	77
Amendment to amended bill of complaint	78	77
Amendment to demurrer of Brotherhood	81	79
Amended demurrer of L. & N. R. R. Co.	82	80
Stipulation setting aside submission on demurrers and granting leave to withdraw amended complaint and to substitute another amended complaint	83	82
Decree setting aside submission	84	82
Substituted amended complaint	84	83
Note re Exhibit 1	100	98
Exhibit II—(copy) (omitted in printing)	100	
Exhibit III—(copy) (omitted in printing)	102	
Demurrer of L. & N. R. R. Co., to complaint as last amended	113	98
Demurrer of Brotherhood to the substituted amended bill	114	99
Demurrer of W. H. Thomas to substituted amended bill	128	114
Plea in abatement of J. P. Adams to the substituted amended bill	136	122
Plea in abatement of B. F. McGill to the substituted amended bill	137	123
Amended plea in abatement of F. B. McGill to the substituted amended bill	138	123
Minute entries of submission on pleadings	139	124
Decree sustaining demurrers and dismissing bill	139	124
Cost bond on appeal (omitted in printing)	141	
Citations on appeal	142	126
Motion re transmittal of exhibits	143	127
Order re transmittal of exhibits	144	128
Certificate of the register re appeal and record	145	129
Proceedings in Supreme Court of Alabama	146	129
Assignment of errors	146	129
Minute entries of argument and submission	147	130

	Original	Print
Decree	149	131
Opinion, Gardner, C. J.	150	131
Motion for stay of execution	166	144
Order staying execution	167	145
Complainant's Exhibit "AA"—Agreement between Louisville & Nashville Railroad and its locomotive firemen and hostlers—issued March 1, 1929	168	146
Clerk's certificate (omitted in printing)	170	
Stipulation governing printing of record	171	169
Order allowing certiorari	172	170

[fol. 1] [File endorsement omitted]

[fol. 2] **IN CIRCUIT COURT OF JEFFERSON COUNTY**

CERTIFICATE OF APPEAL—May 24, 1943; filed in Supreme Court of Alabama May 26, 1943

I, G. H. Boyd, Register of the Circuit Court, Tenth Judicial Circuit of Alabama, In Equity, hereby certify that in the cause of Bester William Steele, Plaintiff, vs. Louisville & Nashville Railroad Company, a Corporation, et al., Defendants, which was tried and determined in this Court on the 27th day of April, 1943, an appeal was taken by the Complainant, Bester William Steele, from the Decree which is in words and figures as follows:

"Decree on Demurrers

"This cause coming on to be heard is submitted for decree upon demurrer of Respondent Louisville & Nashville Railroad Company refiled to the substitute bill of complaint, and demurrer of respondent Brotherhood of Locomotive Firemen and Enginemen to the substitute bill of complaint and the demurrer of W. H. Thomas to the substitute bill of complaint.

"The substitute bill of complaint charges a conspiracy amount the respondent Railroad Corporation, the Brotherhood of Locomotive Firemen and Enginemen, its representatives and its several members to fraudulently eliminate from the services of the Railroad the complainant and other negro firemen, or to discriminate against them in such a way as to give the white firemen, members of said association, advantage in employment status, rate of pay, etc., while the bill in general terms charges fraud and discrimination against the negro firemen, the specific wrong complained of is that representatives of the Brotherhood of Locomotive Firemen and Enginemen (who were statutory representatives of all firemen) and the respondent Louisville & Nashville Railroad Company entered into an employment agreement February 8, 1941, and modified on May 12, 1941, under the terms of which negro firemen, including the *com-* complainant, suffered injury and damage.

[fol. 3] "From a careful analysis of the bill it appears that any relief to which plaintiff is entitled must be predi-

cated upon injuries sustained by him from the wrongful execution of the contract of 1941.

"The rights allegedly taken away from him by such contract arose from a former contract negotiated for him and others by the same Brotherhood. It is admitted by complainant that the Brotherhood of Locomotive Firemen and Enginemen has the legal right to select bargaining representatives for the entire class. It is also admitted that the universal practice among the railroads of the Country is to promote only white firemen to the position of engineer, and that complainant is one of a group of colored firemen who are non-promotable under such practice. No direct relief is here sought against that practice. The contract complained of discloses a plan of operation whereby the number of negro firemen is to be reduced and certain of their privileges under the former contract abridged.

"The contract of 1941 appears on its face as one designed to increase the number of promotable firemen. It makes available more men who may be ultimately promoted to the position of engineer. Such plan may have been necessary to the proper operation of the railroad. In any event the bill fails to negative such necessity or to aver that a contract more favorable to complainant and his class was a practical possibility. The general allegations of fraud and discrimination in the execution of the contract are not assumed to be true merely because its provisions are not as favorable to the entire group of employees, or a portion thereof, as were the provisions of a former contract.

"The Court is therefore of the opinion that the bill of complaint contains no equity; that the demurrers should be sustained and the bill of complaint dismissed. It is therefore, ordered, adjudged and decreed by the Court that the separate and several demurrers of the respondents, Louisville & Nashville Railroad Company, Brotherhood of Locomotive Firemen and Enginemen and W. H. Thomas to the substitute bill of complaint be and they are hereby separately and severally sustained and said bill of complaint is hereby dismissed. Court costs in this cause are hereby taxed against complainant for which let execution issue.

"Done and ordered, this the 27th day of April, 1943.

E. M. Creel, Circuit Judge, In Equity."

[fol. 4] therein rendered to the Supreme Court of Alabama, to be holden of and for said State, and has given a Security

for Costs with Bester William Steel, (L.S.), and Fidelity and Deposit Company of Maryland, By Nelle Steen, Attorney in fact, (Seal), as sureties on said Security for Costs, and that said Security for Costs has been duly approved.

I further certify that notice of said appeal was duly issued and served on the appellee on the 24th day of May, 1943.

Witness my hand and official seal, this the 24th day of May, 1943.

Signed: G. H. Boyd, Register.

[fol. 5] Organization of Court—Omitted in printing

In Circuit Court of Jefferson County

Bester William Steele, Complainant

vs.

Louisville & Nashville Railroad Company, A Corporation,

and,

Brotherhood of Locomotive Firemen, and Enginemen, an Unincorporated Association, Respondents

Original Bill—Filed August 30, 1941

[fol. 6] *To the Honorable Judge or Judges of Said Court:*

1. Your Complainant shows unto your Honor that he is a resident of Jefferson County, Alabama, and is over twenty-one years of age, that respondent Louisville & Nashville Railroad Company is a corporation, incorporated in the State of Kentucky, engaged in interstate commerce by rail transportation, the respondent Brotherhood of Locomotive Firemen & Enginemen (hereinafter called Brotherhood) is a national unincorporated labor union whose membership is principally derived from locomotive firemen and enginemen employed on interstate railroads, including the defendant railroad. It is composed of a Grand Lodge and over nine hundred subordinate Lodges including lodges and officers resident in the State of Alabama and Jefferson County.

2. Complainant is employed by the defendant Louisville & Nashville Railroad Company, on the S. & N. A. Division, with seniority rights as a fireman dating from February 4, 1910. He brings this action in his own behalf and as a class suit on behalf of the other Negro locomotive firemen on said defendant railroad, said other Negro locomotive firemen constituting a class so numerous as to make it impracticable to bring them all before the Court, and there being common question of law and fact, common grievances and common relief as well as special relief sought.

3. The defendant Louisville & Nashville Railroad Company has employed plaintiff and plaintiff is working for it under his individual contract with said Railroad which embodies the Locomotive Firemen and Hostlers Schedule issued March 1, 1929. Article 26 of said Schedule covers the seniority rights of plaintiff and provides that the oldest firemen in road service will have the preference of runs and promotion on the seniority territory to which assigned, when competent and worthy. Plaintiff states that he has an excellent service record and at all times has been and is now wholly competent and worthy for the service he was performing according to his seniority standing until wrongfully displaced as hereinafter stated.

4. The gravemen of the complaint herein lies in acts done pursuant to a conspiracy between the defendant Railroad and the Defendant Brotherhood in which certain [fol. 7] officials of the Railroad and certain officials of the Brotherhood acting on behalf of the Brotherhood as the exclusive bargaining agent under the Railway Labor Act of June 21, 1934 (U. S. Code, Title 45, Chap. 8) did inflict certain grievous wrongs upon plaintiff and the other Negro locomotive firemen then employed on the defendant Railroad individually and as a class. Plaintiff further complains of the defendant Brotherhood separately for the wrongs inflicted upon him individually and upon the Negro firemen on the defendant Railroad as a class as more fully hereinafter set forth.

5. Since the passage of the Railway Labor Act aforesaid the defendant Brotherhood by virtue of the fact its members constitute a majority of the craft or class of locomotive firemen on most of the interstate railroads of the

country, including the defendant railroad, has established itself throughout the country and with the defendant railroad as the exclusive bargaining agent and grievance representative under said Railway Labor Act with respect to rates of pay, rules and working conditions for all the locomotive firemen on said railroads, including the defendant Railroad, not only for its own members but also for the non-member Negro locomotive firemen whom it bars from membership in its organization solely because of race or color. It has further asserted itself under the Railway Labor Act as the sole representative for handling disputes between the said railroads and the individual locomotive firemen arising out of their individual employment contracts on said railroads. By reason of its great membership and nationwide organization, its large national treasury, its skill and power acquired through years of experience in the processes of collective bargaining and protecting the interest of its members it has acquired great prestige and coercive power over the interstate railroads, including the defendant railroad. In all matters herein complained of the Brotherhood has claimed as its source of authority to act and has purported to act under color of authority of the Railway Labor Act.

6. Membership in the defendant Brotherhood has always been and is now restricted by its constitution and practice to white locomotive firemen and enginemen, with Negro locomotive firemen excluded solely because of color. In an effort to obtain for its white member locomotive firemen a monopoly of employment on all railroads, including the defendant Railroad, and gradually to eliminate the Negro non-member locomotive firemen thereon, the Brotherhood [fol. 8] from time to time over a period of fifteen years or more has secretly negotiated with said railroads, including the defendant railroad, a series of agreements and modifications of agreements placing ever increasing strictures on the employment of Negro locomotive firemen and curtailing the seniority rights and prerogatives of Negro locomotive firemen actually in the service of said railroad, including the defendant railroad, to the special advantage of the white locomotive firemen members of the defendant Brotherhood. As a direct consequence of the Brotherhood's persistent course of discrimination against them, employment of Negro firemen on all rail-

roads, including the defendant railroad, has greatly declined, their job assignments have become less frequent and more irregular, their work more hazardous and burdensome as a class in comparison with the number; job assignments, earnings and conditions of work of the white locomotive firemen, members of the defendant Brotherhood, as a class. Further the defendant Brotherhood has sought a monopoly for its own members of employment on said railroads, including the defendant railroad, as locomotive firemen at the expense of the Negro locomotive firemen as a class.

7. On and prior to February 22, 1941, plaintiff was a locomotive fireman working on the S. & N. A. Division of the defendant railroad in the "pool," with mileage guaranteed per month, which amounted on an average between 4,100 and 4,500 miles per month, at the rate of $5.75 a hundred miles or $5.51 a hundred miles according to the class of engine he was firing. His average monthly pay check was about $225.00, after deductions of $7.65 for insurance; $2.60 for hospital fund, and $3.00 per $100.00 for retirement. By virtue of his seniority he was holding down one of the best assignments in said seniority territory (the S. & N. A. Division constituting in itself a seniority territory within the meaning of the Article 26 aforesaid).

8. The defendant Brotherhood in functioning as a sole and exclusive representative under the Railway Labor Act, particularly sections 151a and 152, Title 45, U. S. Code, of all the locomotive firemen on the defendant railroad owes a statutory and fiduciary duty to each locomotive fireman, including plaintiff and the other Negro locomotive firemen as a class, that it shall represent him loyally, in [fol. 9] good faith, that it shall not seek a monopoly or other special advantage for its members to the detriment of the non-member firemen, that it shall make full disclosure of all negotiations and other proposed actions affecting the individual fireman's rate of pay, rules and working conditions, that it shall give reasonable notice, opportunity to be heard, and a chance to vote to all locomotive firemen, members and non-members alike, on any action proposed, and prompt and full report on all action taken affecting his interest, and generally that it shall conform to and regard the rules of law and standards of conduct governing the relationship of principal and agent as

the statutory agent of all of the individual locomotive firemen on the railroad. Nevertheless in flagrant violation of its duties in the premises so far as plaintiff individually and the other Negro locomotive firemen as a class (same constituting a minority of all the firemen on the defendant railroad) are concerned, the defendant Brotherhood has persistently been unfaithful to its fiduciary relationship, has been and is now disloyal to plaintiff and the other non member minority Negro locomotive firemen as a class, has sought to force them out of employment and destroy their vested property rights in an effort to obtain a monopoly of employment (or failing that the most favored rates of pay, rules and working conditions, for its own members, has refused and still refuses to notify plaintiff and the other minority Negro locomotive firemen of proposed actions affecting their interest, to report its deeds done as their bargaining representative under the Railway Labor Act, and has refused and still refuses to give them fair, honest and faithful representation under the Railway Labor Act.

9. Although the Negro firemen constitute the minority group of firemen on the entire defendant railroad system, they constitute the majority group of the division to which plaintiff is assigned and in which he has seniority rights, to-wit: The S. & N. A. Division aforesaid. The Negro firemen there constitute eighty percent or more of the total number of firemen on said division; and up to the making of the agreement hereinafter referred to had exercised their vested seniority rights established under the individual contracts pursuant to the Schedule of March 1, 1929, aforesaid.

10. Nevertheless on or about February 18, 1941, effective February 22, 1941, the defendant railroad and the defendant Brotherhood, in concert with certain other railroads in [fol. 10] the group known as The Southeastern Carriers, in an effort by the Brotherhood to obtain for its membership the most favored rates of pay, rules and working conditions at the expense of plaintiff and other minority Negro locomotive firemen as a class, did enter into a secret, fraudulent agreement to impair and destroy plaintiff's vested seniority rights and the seniority rights of the other minority Negro locomotive firemen. A copy of said agreement is hereto attached as Exhibit I and the secret modification

of said agreement effected between the defendant railroad and the defendant Brotherhood on or about May 12, 1941 is hereto attached as Exhibit 2, and both are prayed to be read in full as part of this paragraph.

11. Negro firemen constitute the only class of non-promotable firemen who cannot under present railroad and labor custom be promoted regardless of efficiency, experience or other personal qualifications; and constitute the class discriminated against under the agreement and modification above mentioned.

12. As a result of the terms of said secret fraudulent agreement effective February 22, 1941, on or about April 7, 1941, the defendant Brotherhood in violation of its duty toward plaintiff as his exclusive bargaining representative under the Railway Labor Act as aforesaid did force the defendant railroad to breach its individual contract of employment with plaintiff, destroy plaintiff's seniority rights and wrongfully remove him from the assignment which he then held and which he was entitled to by virtue of his seniority, competence and worth, and without cause or excuse and solely because of his color and race did force the defendant railroad to replace him with white locomotive firemen, member of the defendant Brotherhood. In acting the defendant Brotherhood was seeking a fraudulent, preferential advantage for its own members, and a part of the class it represents against complainant and other minority Negro firemen as a class.

13. In consequence of the wrongful acts by the defendants aforesaid plaintiff's earnings have been reduced by over $50.00 a month, his work assignments have been more irregular and hazardous. Plaintiff's vested retirements under the Railway Retirement Act of June 24, 1937 (U. S. Code Title 45, Chap. 9) have been seriously impaired unless relief is granted by this Honorable Court.

[fol. 11] 14. Complainant has exhausted his administrative remedies outside of Court. He has appealed for relief and restoration of his vested seniority prerogatives to the highest operating officer of the defendant railroad with jurisdiction in the premises, and to the general chairman of the defendant Brotherhood representing the Brotherhood and the individual locomotive firemen, including himself, on the defendant railroad. Nevertheless he has been denied

all relief, and said wrongs have continued and will forever continue unless restrained and redressed by this honorable Court. And other minority Negro locomotive firemen on the defendant railroad have been injured and their vested seniority and retirement rights have been curtailed and destroyed by similar action on the part of the defendants.

Wherefore Premises Considered: Your petitioner prays that Louisville & Nashville Railroad Company, a corporation by service on R. E. Steiner at 1107-25 First National Bank Building, Montgomery, Alabama, and Brotherhood of Locomotive Firemen and Enginemen and Unincorporated Association, by service upon M. S. Goodwin at 1043 South McDonough Street, Montgomery, Alabama, respondents, be made parties to these proceedings by proper process; that they be required to plead, answer or demur thereto within the time prescribed by law, petitioner further prays that:

1. A permanent injunction against each of the defendants perpetually enjoining them and each of them from enforcing or otherwise recognizing the secret, fraudulent agreement above mentioned and any modification or modifications thereof.

2. Discovery by the Brotherhood of all agreements and negotiations undertaken by it with the defendant railroad since the Railway Labor Act of 1934 in which it purported to act under said Act as the exclusive bargaining agent for all the locomotive firemen on the defendant railroad, which have resulted in its occupying a hostile position or having conflicting interests with plaintiff and other non-member minority Negro locomotive firemen, regarding rates of pay, rules or working conditions of said firemen on the defendant railroad.

3. Restoration of plaintiff's and other Negro locomotive firemen's rights and recognition of the same apart from said secret fraudulent agreement and any modification or modifications thereof.

[fol. 12] 4. A permanent injunction against the defendant Brotherhood, its officers, subordinate lodges, members, agents, or attorneys perpetually enjoining them and each of them from purporting to act as representative or representatives under the Railway Labor Act for all the locomotive firemen on the defendant railroad, specifically plaintiff and other non-member minority Negro locomotive firemen,

so long as it or they refuse to give plaintiff and the other Negro locomotive firemen notice, opportunity to be heard and a vote on all matters affecting them individually or in common with the other locomotive firemen on defendant railroad as a class.

5. A decree binding on all parties hereto and their privies and those represented herein, settling and declaring the rights, interests and other legal relations of the respective parties in and to and by reason of the matters herein controverted.

6. Damages against the Brotherhood for loss of wages, destruction of vested seniority preference rights, and breach of its duty of representation under the Railway Labor Act, and the other injuries set forth above resulting from the Brotherhood's acts as set forth in the sum of Fifty Thousand ($50,000.00) Dollars.

7. Relief for the other Negro locomotive firemen on the defendant Railroad as a class in the same manner as herein prayed individually, and further as their interests may appear.

8. Plaintiff prays that he may have such other, further and proper relief in the premises to which he has shown himself entitled, and which may seem meet and proper to your Honor.

Arthur D. Shores, Attorney for Plaintiff; Charles H. Houston, Washington, D. C.; Arthur D. Shores, Birmingham, Alabama; J. T. Settle, Memphis, Tennessee; J. C. Waddy, Washington, D. C., Attorneys for Plaintiff.

[fol. 13] *Duly sworn to by Bester William Steele: Jurat omitted in printing.*

EXHIBIT # 1 TO ORIGINAL BILL

Agreement between The Southeastern Carriers' Conference Committee, Representing the Atlantic Coast Line Railway Company, Atlanta and West Point Railroad Company and Western Railway of Alabama, Atlanta Joint

Terminals, Central of Georgia Railway Company, Georgia Railroad, Jacksonville Terminal Company, Louisville and Nashville Railroad Company, Norfolk and Portmouth Belt Line Railroad Company, Norfolk Southern Railroad Company, St. Louis San Francisco Railroad Company, Seaboard Air Line Railway Company, Southern Railway Company (including State University Railroad Company and Northern Alabama Railway Company). The Cincinnati, New Orleans and Texas Pacific Railway Company, The Alabama Great Southern Railroad Company (including Woodstock and Blockton Railway Company and Belt Railday Company of Chattanooga). New Orleans and Northeastern Railroad Company, New Orleans Terminal Company, Georgia Southern and Florida Railway Company, [fol. 14] St. John River Terminal Company, Harriman and Northeastern Railroad Company, Cincinnati, Burnside and Cumberland River Railway Company, Tennessee Central Railway Company, and the Brotherhood of Locomotive Firemen and Enginemen:

(1) On each railroad party hereto the proportion of non-promotable firemen, and helpers on other than steam power, shall not exceed fifty per cent in each class of service established as such on each individual carrier. This agreement does not sanction the employment of non-promotable men on any seniority district on which non-promotable men are not now employed.

(2) The above percentage shall be reached as follows:

(a) Until such percentage is reached on any seniority district only promotable men will be hired.

(b) Until such percentage is reached on any seniority district all new runs and all vacancies created by death, dismissal, resignation or disqualification shall be filled by promotable men. A change in the starting time of the same run or job will not be considered as constituting a new run.

(3) Except as provided in items (2) (a) and (2) (b) men now holding seniority as firemen or helpers on other steam power, shall be permitted to exercise seniority in accordance with their seniority and the rules of their respective schedules.

(4) It is understood that promotable firemen, or helpers on other than steam power, are those who are in line for

promotion under the present rules and practices to the position of locomotive engineers.

(5) It is understood and agreed that on any road having, in the opinion of its B. of L. F. and E. Committee, more favorable rules or conditions than above stipulated, such rules and conditions may at the option of such committee be retained in lieu of the above provisions.

(6) All persons hereafter hired as firemen shall be required in addition to showing, in the opinion of manage- [fol. 15] ment, reasonable proficiency, to take within stated periods to be fixed by management, but in no event to extent over a period of more than three years, two examinations to be prepared by management and to be applied to all alike to test their qualifications as firemen. A fireman failing to pass either examination shall have a second trial within three months.

Firemen hereafter hired declining to take or failing to pass either of the examinations provided for in the preceding paragraph shall be dropped from the service.

Promotable firemen who pass the two examinations above referred to shall be required to take an examination for promotion to the position of engineer when they have had three and not more than four years of actual service. Upon passing such promotional examination and meeting all the requirements established by the carrier for the position of engineer, they shall, when there is need for additional engineers, be promoted to such position, and will establish a seniority date as engineer in accordance with the rules contained in the agreements on the individual railroads.

When rules for conduct of examination for promotion are included in current schedules, such rules shall apply. In the absence of such rules firemen failing to pass will be given a second trial within a period of three months and if they fail to pass on the second trial will be given a third trial within a period of three months.

Promotable firemen declining to take examinations for promotion, or who fail in their efforts to successfully pass the same, shall be dropped from service.

All promotable firemen now in the service physically qualified, who have not heretofore been called for examination for promotion, or who — not waived promotion, shall be called in their turn for promotion. When so called should

they decline to take such examinations for promotion or fail to pass as herein provided they shall be dropped from the service.

(7) It is expressly understood that in making this agreement representatives of the employees do not waive and are in no way prejudiced in the right to request agreements on the individual carriers here represented which will restrict the employment of helpers on other than steam power [fol. 16] to promotable men; and it is agreed that this question is to be negotiated to a conclusion with the individual carriers.

(8) This agreement shall become effective February 22, 1941.

Signed at Washington, D. C., this 18th day of February, 1941.

For the Employees: Brotherhood of Locomotive Firemen and Enginemen, D. B. Robertson, President. Brotherhood of Locomotive Firemen and Enginemen's Committee, W. O. Metcalfe, Chairman.

For the Carriers: Southeastern Carrier' Conference Committee, C. D. Mackay, Chairman; C. D. Mackay, H. A. Benton, C. G. Sibley, Committee Members.

EXHIBIT NO. II TO ORIGINAL BILL

Agreement in connection with application on the L. & N. Railroad of Agreement between the Southeastern Carriers Conference and the Brotherhood of Locomotive Firemen and Enginemen, dated Washington, D. C., February 18, 1941, to become effective February 22, 1941, regarding the employment and assignment of firemen, as agreed by Mr. W. B. Porter, Asst. Director of Personnel, Mr. G. C. Howard, Asst. Director of Personnel, representing the L. & N. Railroad, and Mr. W. G. Metcalfe, General Chairman, representing the Brotherhood of Locomotive Firemen and Enginemen:

1. Q. What constitutes a new run under Article 2 (b) of the agreement above mentioned?

A. When it is changed to the extent that it is operated out of different terminals, the mileage lengthened or shortened to the extent of 20 miles per day, or the scheduled compensation on runs paid under Article 3, Section (a), of the general Agreement, changed to the equivalent of 20 miles per day, when a run is operated six days per week instead of seven, or vice versa, and new run hereafter inaugurated or any run discontinued and thereafter re-established. (See [fol. 17] Article 25, Sections 12 and 13.)

In yard service it is understood that a new job is when a job is changed from a six day job to a seven day job, or from a seven day job, to a six day job, or where the point for going on duty or being relieved is permanently changed as much as one-half mile, and any job hereafter inaugurated or any job discontinued and thereafter re-bulletined. Changing the off day without changing the number of days worked per week would not constitute a new job. (See Art. 25, Sections 12 and 13.)

Adjusting Pool Boards:

2. Q. In the matter of increasing first and second pool boards, where such pools are maintained, would the addition of one or more men to such pools be considered as a new job in the purview of Article 2 (b) of the above mentioned agreement?

A. Yes.

3. Q. In making reduction in the number of men in either the first or second pool, how would these reductions be made as regards promotable and non-promotable firemen?

A. Seniority will govern provided the percentage of promotable firemen will not reduce when such percentage is 50 or below.

For Example:

If the first pool firemen's board were increased from ten to twelve men, there being six non-promotable and four promotable men in that board, two promotable firemen should be added to bring the board up to twelve, or 50 per cent.

If a reduction were made in such board from twelve to ten or two men were to be cut off, one promotable and one non-promotable firemen would be cut off, provided the two junior firemen were promotable, but if three instead of two men were cut from the board, then one promotable and the two junior non-promotable men would come off.

To further illustrate: If in second pool there were 25 promotable and one non-promotable firemen and it was necessary to cut the board five men, the one non-promotable firemen would be allowed to remain in the pool provided he had seniority over the five promotable men cut off.

[fol. 18] To again illustrate: If the first pool had ten non-promotable and ten promotable firemen and the pool had to be reduced *for* men, or to sixteen. In the event non-promotable men had seniority over the promotable men, the promotable men would be cut off to the extent of reducing and maintaining the ratio 50-50. If there were six promotable and six non-promotable men in the pool, and it were necessary to cut two men off, the two junior firemen being non-promotable, they would be cut off under the seniority rules.

Passenger Service:

Examples:

4. Q. There are three groups of passenger runs, two firemen being assigned to each group—a total of six men, all non-promotable. Each fireman is required to lose three round trips per month account of mileage regulations. These runs are grouped together and seven firemen assigned to protect them in lieu of the gouge, working first in, first out. Under Article 26, Section 22, the six runs would be advertised.

How should assignments be made?

A. In the event the mileage of the six non-promotable firemen was not decreased to the extent of twenty miles per day, or the equivalent of twenty miles per day, these six men could not be disturbed, except under seniority rules. However, the senior promotable fireman bidding as the 7th man in the pool, would be assigned to the job.

5. Q. In the event the mileage or the equivalent thereof is decreased twenty miles per day, how would assignments then be made?

A. On seniority except that non-promotable firemen could not be assigned to more than 50% of the jobs.

6. Q. Should these same runs later be changed and six crew re-assigned as formerly, the 7th job being cut off, how should assignments then be made?

A. Senior applicant should be assigned.

7. Q. How should assignments be made, when the ratio of non-promotable to promotable firemen is 6 and 4, and a new run is added, requiring

(A) 1 additional firemen? Ans. Senior promotable [fol. 19] fireman should be assigned.

(B) 2 additional firemen? Ans. Two senior promotable firemen should be assigned.

(C) 3 additional firemen? Ans. Three senior promotable firemen should be assigned.

8. Q. Should another run be added requiring one fireman after the ratio has reached 6 non-promotable and 7 promotable firemen, how should assignments be made?

A. As the ratio of non-promotable to promotable is less than 50%, the senior applicant would be assigned whether non-promotable or promotable.

9. Q. In passenger service the ratio of non-promotable to promotable firemen stand 6 to 4. In this class there is a group of 3 passenger runs manned by four non-promotable and two promotable firemen. A new run is added to this group requiring two men and the entire group of runs is advertised, how should assignments be made?

A. Two promotable senior firemen should be assigned to the group.

10. Q. With the ratio in this class standing 6 and 6 "A" one of the promotable firemen is assigned as engineer. How should this vacancy be filled?

A. By senior promotable firemen.

11. Q. When "A" is cut off as engineer, to what run is he entitled?

A. To any run held by a junior fireman, either promotable or non-promotable.

12. Q. Should "A" displace a junior promotable fireman in this class, how should the latter be governed?

A. He should displace any junior fireman.

13. Q. If "A" displaces a junior non-promotable fireman in this class, how should the latter be governed?

A. He could exercise his seniority over any junior non-promotable firemen provided that in doing so the non-pro-

motable firemen should not be assigned to more than 50% of any class of service.

14. Q. The ratio in passenger service is 50-50. There are [fol. 20] four runs one of which is discontinued and the remaining three runs in the group are readvertised for six men. How should assignment be made?

A. To the senior applicant unless — so doing the ratio of non-promotable firemen would exceed 50%, in which event sufficient promotable junior firemen should be assigned to prevent non-promotable firemen exceeding 50%.

15. Q. The ratio of non-promotable to promotable firemen in passenger service is 5 and 8. A new run is bid, requiring:

(A) Two men. (B) Three men. (C) Four men.

How should assignments be made?

A. (A) Senior applicants would be assigned.

(B) Senior applicants would be assigned.

(C) Senior applicants would be assigned,

unless by so doing the ratio of non-promotable to promotable firemen would thereby exceed 50%, in which event sufficient junior promotable firemen would be assigned to avoid this.

Assigned Through Freight Service:

16. Q. The ratio of non-promotable to promotable firemen is 8 and 5. One of the non-promotable firemen gives up his run and takes pool service, how should his vacancy be filled?

A. By the senior applicant.

17. Q. Should the senior applicant be promotable fireman in the same class, how should this vacancy be filled?

A. By the senior applicant.

18. Q. The ratio of non-promotable to promotable firemen is 7 and 5. A non-promotable fireman dies, is discharged, resigns, or is disqualified, how should this vacancy be filled?

A. By the senior applicant. (promotable)

19. Q. The ratio of non-promotable firemen is 5 to 7. A non-promotable fireman dies, is discharged, resigned, or is discharged, how should his place be filled?

A. By the senior applicant.

20. Q. The ratio of non-promotable to promotable firemen is 6 and 6. A new run is added requiring two men, how should the assignment be made?

A. By the senior applicant unless both are non-promotable firemen, in which event the senior promotable fireman [fol. 21] and senior nonpromotable firemen should be assigned.

21. Q. The ratio of non-promotable firemen to promotable firemen is 6 and 6. A new run is added requiring three men, how should assignments be made?

A. The senior applicant, unless they are all non-promotable firemen, in which event one senior non-promotable and two senior promotable firemen will be assigned.

First Pool:

22. Q. The ratio of non-promotable to promotable firemen in first pool is 6 and 4. At the adjustment period, two men are added to the pool. How should assignments be made?

A. The two senior promotable applicants should be added.

23. Q. The ratio of non-promotable firemen to promotable firemen in the first pool is 6 and 4. At the adjustment period two men are to be taken out of pool. Should non-promotable or promotable men be taken out?

A. The two junior non-promotable firemen should be taken out of the pool.

24. Q. The ratio of non-promotable firemen to promotable firemen in first pool is 6 and 6. At adjustment period two men are to be taken out. Should non-promotable or promotable men be taken out?

(A) Two junior men being non-promotable.

(B) Two junior men being promotable.

(C) One of the junior men being non-promotable and one being promotable?

A. (A) Seniority would govern and the two junior men would be taken out of the pool.

(B) The junior promotable and the junior non-promotable would be taken out of the pool.

(C) Seniority would govern.

25. Q. With the same ratio under same circumstances as outlined next above, three men are to be taken out of the pool:

(A) The three junior men being non-promotable.

(B) The three junior men being promotable.

(C) The two junior men being non-promotable and the next junior man promotable.

[fol. 22] A. (A) Seniority would govern.

(B) One junior promotable man and the two junior non-promotable men would be taken out.

(C) Seniority would govern.

Q. (D) The two junior men being promotable and two next junior men being non-promotable.

A. (D) The junior promotable man and two junior non-promotable men.

26. Q. When "A" is cut off as engineer, how should he place himself?

A. He may displace any junior fireman.

27. Q. The ratio of promotable and non-promotable firemen is 6 and 6. "A" is assigned as engineer, how should his vacancy be filled?

A. By senior promotable fireman.

28. Q. The ratio of non-promotable to promotable firemen in first pool is 7 and 6. "A" is assigned as engineer. How should his vacancy be filled?

A. By senior promotable applicant.

29. Q. "A" is later cut off as engineer. How should he place himself?

A. He may displace any junior fireman.

Second Pool:

30. Q. The ratio of non-promotable to promotable firemen in second pool is 6 and 6. The first pool at adjustment period is reduced two men, resulting in displacement of two men in second pool. Who should be displaced?

(A) If the two junior men in second pool were promotable men?

(B) If the two junior men in second pool were non-promotable men?

(C) If the two junior men in the second pool were one promotable and one non-promotable.

A. (A) The junior non-promotable man and the junior [fol. 23] promotable man should be taken out of the pool.

(B) Seniority would govern.

(C) Seniority would govern.

31. Q. The ratio of non-promotable men to promotable men in the 2nd pool is 6 and 7. The first pool at adjustment period is reduced *tow* men, resulting in displacement of two men in second pool. Who should be displaced?

(A) If the two junior men were promotable?

(B) If the two junior men were non-promotable?

(C) If the two junior men were one promotable and one non-promotable?

A. (A) The junior non-promotable and the junior promotable men would be taken out.

(B) Seniority would govern.

(C) Seniority would govern.

32. Q. The ratio of non-promotable to promotable men is 6 and 8 in the second pool. The first pool at adjustment period is reduced 2 men, resulting in displacement of two men in second pool. Who should be displaced:

(A) If the two junior men were promotable?

(B) If the two junior men were non-promotable?

(C) If the junior men were one promotable and one non-promotable.

A. (A) Seniority would govern.

(B) Seniority would govern.

(C) Seniority would govern.

33. Q. The ratio of promotable men to non-promotable men is 6 and 6. There is a vacancy as hostler and no bids received, and the junior promotable fireman is assigned. If it is necessary to fill the latter's place in second pool, should the non-promotable or the promotable cut off fireman be assigned to the pool?

A. Senior promotable cut off man should be assigned.

34. Q. The ratio of non-promotable to promotable firemen in second pool is 6 and 7. A vacancy as hostler is advertised and no bids received, the junior promotable fireman being assigned. It is necessary to fill the latter's [fol. 24] place. Should the senior promotable or non-promotable fireman be added to the second pool?

A. The senior cut off promotable fireman should be added.

35. Q. The ratio of non-promotable to promotable firemen in second pool is 6 and 8. A vacancy for hostler is advertised and no bids received; the junior promotable fireman being assigned. It is necessary to fill the latter's place. Should the senior promotable or non-promotable cut off fireman be added to the second pool?

A. The senior cut off should be added.

It is understood by both parties to this agreement that it became effective March 15, 1941, and no transaction that took place prior to March 15th, is considered as coming under the terms of Washington Mediation Agreement of February 22, 1941.

Accepted for the Employees (S.) W. G. Metcalfe, General Chairman, B. L. F. & E.

Accepted for the L. & N. Railroad Co. By (S.) R. C. Parsons, Director of Personnel.

Louisville, Kentucky, May 12, 1941.

IN CIRCUIT COURT OF JEFFERSON COUNTY

DEMURRER OF RESPONDENT LOUISVILLE & NASHVILLE RAILROAD COMPANY—Filed October 3, 1941

Comes the Respondent, Louisville & Nashville Railroad Company, and demurs to the Bill of Complaint, and as grounds of demurrer, assigns the following, separately and severally:

1. There is no equity in the Bill.

2. Said Bill alleges as a conclusion, alleged seniority rights of the complainant as a fireman.

3. The averments of said Bill are not sufficient, definite or certain as to what alleged seniority rights the said complainant is claiming in said cause.

4. The averments of said Bill that the said complainant was possessed of seniority rights as a fireman were alleged as a conclusion of the complainant, and no facts are alleged sustaining the averment.

[fol. 25] 5. The said Bill fails to allege in substance or in haec verba any contract between the complainant and the

respondent, Louisville & Nashville Railroad Company, whereby and under which the said complainant is entitled to any contractual rights of seniority.

6. For that said Bill fails to allege or set out facts which entitle him to maintain said suit on behalf of a class.

7. For that no right is shown in the complainant to prosecute said suit on behalf of a class, and said Bill fails to allege the consent or authority from such a class to the said complainant to bring and prosecute said suit.

8. Said Bill fails to allege the substance or in haec verba the alleged individual contract between the complainant and the respondent.

9. For that the averments of said Bill show that the said complainant commenced his service with the defendant on or about February 4, 1910 and claims the benefit individually of a contract between the Company defendant and the Locomotive Firemen and Hostlers of March 1, 1929.

10. For that said Bill of complaint shows that the said complainant is asking the benefits of the alleged contract between the Railroad and the Locomotive Firemen and Hostlers' Schedule issued on March 1, 1929, and is unwilling to abide by the terms, provisions and conditions of said alleged schedule or contract.

11. For that there is no equity in said Bill, in that the complainant seeks to obtain the benefits of an alleged contract between the defendant Company and the Brotherhood of Locomotive Firemen and Hostlers of March 1, 1929, and is unwilling to abide by the other terms, provisions and conditions of said alleged contract.

12. For that said Bill fails to allege that the said complainant is such a fireman as is entitled to the alleged preference of runs and promotion on seniority territory as are the members of the Locomotive Firemen and Hostlers' Brotherhood.

13. Said Bill fails to allege or set out in substance or in haec verba the alleged schedule issued March 1, 1929, and Article 26 of said Schedule.

[fol. 26] 14. Said Bill of Complaint shows that plaintiff is seeking to obtain the benefits of an alleged contract between

the defendant Company and the Locomotive Firemen and Hostlers' Schedule of March 1, 1929, as though he were a member of said Brotherhood or Association, without the averment that he is a member of said Brotherhood or Association.

15. Said Bill fails to allege what the alleged conspiracy was between the said railroad and the defendant Brotherhood.

16. Said Bill does not allege facts sustaining the averment of conspiracy between the railroad and the defendant Brotherhood.

17. Said Bill alleges conspiracy between the railroad and the defendant Brotherhood, as a conclusion of the pleader.

18. The averments of said Bill fail to allege the name of the officials of the railroad Company who are alleged to have entered into a conspiracy with the Brotherhood or that their names are unknown.

19. For that said Bill fails to allege that the alleged officials of the railroad Company at the time of acting in pursuance of an alleged conspiracy were in so acting, acting within the line, scope and course of their employment.

20. For that the averments of said Bill of Complaint show that such action as was taken by the railroad Company is under and by virtue of the provisions of law, namely, Railway Labor Act of June 21, 1934.

21. The averments of said Bill show that the defendant railroad company had no alternative but to treat and act with the legally established bargaining agency under the provisions of the Railway Labor Act.

22. For that complainant's recourse is through means of revised legislation, if the effect of the operation of the Railway Labor Act and the law is such that it inflicts grievous wrongs upon the said complainant.

23. Said complainant complains in this suit of the effect and operation of laws duly passed and adopted by the Con- [fol. 27] gress of the United States, and his remedy and recourse, if said laws work a wrong or injustice upon him, is by repeal of the same.

24. For that the averments of said complaint construed most strongly against the complainant show that the said defendant did nothing more than to comply with the law.

25. For that the averments of said Bill of complaint show that the defendant complied with the law, and such compliance with the law cannot be construed as working a wrong or injury upon the said complainant.

26. The averments of said Bill of complaint show the legal creation of a bargaining agency by the Brotherhood and fails to allege any acts or conduct upon the part of the defendant in violation of the provisions of law, on the other hand, the averments of said Bill show so far as the defendant railroad Company is concerned, a compliance with the provisions of the law.

27. For that said defendant railroad Company is not alleged in any way to be responsible for the creation of the bargaining agency of the Brotherhood, nor any participation in its creation and maintenance.

28. Said Bill fails to allege facts showing the responsibility of the defendant railroad Company for the creation of the Brotherhood, or of its bargaining agency.

29. Said Bill of complaint fails to allege any wrong doing by the defendant Louisville & Nashville Railroad Company.

30. For that the averment of facts in said cause contradicts and repudiates the averment of conclusion averred in said Bill that the defendant railroad is guilty of conspiracy.

31. For that the right of the Brotherhood to act as the sole representative and bargaining agency is in no wise controverted or disputed by the said complainant.

32. For that under the averments of said Bill, the agreements made and entered into by and between the railroad and the legally created bargaining agency are binding upon the said complainant and other individuals.

33. For that the said complainant is not entitled to receive the benefits of the acts and agreements of the alleged bargaining agency or the Brotherhood and to revoke and repudiate the other provisions and conditions of its contract [fol. 28] with the railroad company.

34. For that said Bill shows that the Louisville & Nashville Railroad Company did not willingly enter into any

contract or agreement prejudicial or injurious to the said complainant.

35. For that the acts of the said railroad with the bargaining agency created under the provisions of the Railway Labor Act are legal.

36. The said defendant by operation and effect of law, is prohibited and restricted from participating in the membership of the Brotherhood.

37. The averment that the Brotherhood has secretly negotiated with the railroad Company is a conclusion of the said complainant, and said Bill fails to allege in substance or in haec verba any agreements or substance of agreements made and entered into secretly between the railroad and the Brotherhood.

38. Said Bill of Complaint fails to allege any discrimination against the said complainant by the said railroad Company.

39. For that said Bill of Complaint fails to allege any treatment or consideration of the complainant by the Railroad Company different from that provided by the terms and provisions of a contract or agreement duly made and entered into by and between the Railroad Company and the bargaining agency of the Brotherhood.

40. Said Bill is indefinite and uncertain as to its averments as to how or by what process the said complainant has lost any substantial monthly wage.

41. Said Bill fails to allege the breach of any statutory or fiduciary duty owing by the defendant railroad Company to the said complainant, and the breach thereof proximately resulting in injury or damage to the said complainant.

42. Said Bill of Complaint fails to allege the responsibility of the defendant railroad Company for any lack of loyalty or good faith to the said complainant by the said Brotherhood.

43. For that the averment of fact contained in said Bill of Complaint fails to allege any failure on the part of the defendant railroad Company to comply with the terms and provisions of law.

[fol. 29] 44. Said Bill fails to allege that the defendant has at any time denied to the complainant his right of negotiation with the defendant as to his rate of pay, rules and working conditions.

45. Said Bill fails to allege any responsibility on the part of the defendant railroad Company for any alleged unfaithfulness or disloyalty on the part of the Brotherhood to the said complainant.

46. For that said Bill fails to allege that the alleged contract between the defendant and the Brotherhood of date February 18, 1941, was illegal or unlawful in any respect.

47. Said Bill of Complaint fails to allege that there was any lack of authority upon the part of the Brotherhood to negotiate * * * and effect the contract of February 18, 1941.

48. The averments of said Bill of Complaint show that the alleged Brotherhood forced the defendant, railroad Company into the making of the alleged contract complained of, and that in so forcing the railroad Company into the execution of said contract, that the said Brotherhood was acting within its legal rights, power and authority, and there is no averment that the said defendant voluntarily or willingly entered into said contract or at any time breached the same.

49. Said Bill of Complaint fails to allege or state facts showing that the said complainant is entitled as against this defendant to perpetually enjoin it from carrying out and executing its contract with the bargaining agency under the Railway Labor Act.

50. For that said Bill shows that the bargaining agency with whom the defendant railroad Company dealt in this cause was legally designated by proper authority without interference, influence or coercion on the part of this defendant Company, and that said bargaining agency was legally created and that therefore, under the provisions of law, the defendant railroad Company had no alternative but to comply with the provisions of the law in dealing with said agency, and that the contract between the agency and the railroad was and is a legal contract.

51. For that under the provisions of the law, failure of the defendant to comply with the provisions of the Railway [fol. 30] Labor Act would constitute a violation of the law on the part of said railroad Company.

52. For that the effect of the relief sought by the complainant in this cause, would be to force the defendant railroad Company to violate the law as enacted by the Congress of the United States.

53. For that under the averments of said Bill of Complaint, the defendant railroad Company has done no more than to comply with the provisions of the Railway Labor Act.

54. For that the averments of said Bill of Complaint show the making of a legal contract, and a legal contract having been made by and between the railroad and the representative bargaining agency, the said bargaining agency was possessed of the right to an enforcement of the contract, and the enforcement of the provisions of the contract gives to complainant no just cause or ground of complaint.

55. For that under the provisions of the Railway Labor Act, the defendant railroad Company was under affirmative duty to treat only with the bargaining agency created by the Brotherhood, and with no other.

Chas. H. Eyster, Gibson & Gibson, by White E. Gibson, Solicitors for defendant, Louisville & Nashville Railroad Company.

In Circuit Court of Jefferson County

Plea in Abatement by Respondent Brotherhood—Filed October 4, 1941

Comes the Brotherhood of Locomotive Firemen and Enginemen, an unincorporated association, named in the Bill of Complaint in this cause as a party respondent thereto, and appearing specially for the purpose of this Plea in Abatement, for testing the jurisdiction of this Court over this association and over this cause of action and the jurisdiction of this Court to entertain this cause of action

as against this association, and for no other purpose, enters the following Plea in Abatement:

The Brotherhood of Locomotive Firemen and Enginemen for plea says that this action is not a cause of action for or upon which the complainant herein may maintain such [fol. 31] an action against and *and* in the name of this association, and this Court has no jurisdiction to entertain this cause of action against and in the name of this association under the laws of the State of Alabama, for the reasons hereinafter set forth, all of which this association is ready to verify:

(1) The original Bill of Complaint does not show that this action is maintainable against the members generally of this association.

(2) The original Bill of Complaint shows that the documents constituting Exhibits 1 and 2 of said Bill of Complaint were not executed for or on behalf of the members of this association, and in fact they or either of them were not executed for or on behalf of the members of this association; but said Bill of Complaint shows, on the contrary, that it pertains and was intended to be applicable only to the locomotive firemen employed on certain railroads in the southeastern part of the United States.

(3) The original Bill of Complaint does not allege that the execution of the documents constituting Exhibits 1 and 2 of the original Bill of Complaint, which the complainant charges were executed pursuant to an unlawful conspiracy and are invalid, was either authorized or ratified by the members of this association. In fact the execution of the said documents was neither authorized nor ratified by the members of this association.

(4) The original Bill of Complaint does not allege that the persons whose names appear on Exhibits 1 and 2 of the original Bill of Complaint as signing on behalf of the Brotherhood of Locomotive Firemen and Enginemen and Brotherhood of Locomotive Firemen and Enginemen's Committee were authorized by the members of this association to execute the said documents, or that the execution of said documents was ratified by the members of this association. In fact said persons were not authorized by the members of this association to execute said contract.

and neither was the execution of said contract ratified by the members of this association.

Wherefore, this association prays judgment of the said summons and Bill of Complaint and that the same be quashed.

Harold C. Heiss, Lange, Simpson, Brantley & Robinson, Attorneys for Brotherhood of Locomotive Firemen and Enginemen, appearing specially as aforesaid.

[fol. 32] *Duly sworn to by William Liffiton. Jurat omitted in printing.*

IN CIRCUIT COURT OF JEFFERSON COUNTY

MINUTE ENTRY OF SUBMISSION OF PLEA IN ABATEMENT—November 12, 1941

On November 12, 1941, it is ordered by the Court that this cause be submitted on the sufficiency of the plea in abatement.

IN CIRCUIT COURT OF JEFFERSON COUNTY

DECREE HOLDING PLEA IN ABATEMENT INSUFFICIENT—Filed November 12, 1941

This cause coming on to be heard is submitted upon the sufficiency of a plea in abatement filed by the respondent, Brotherhood of Locomotive Firemen and Enginemen, an unincorporated association, and the Court having considered and understood the same is of the opinion that said plea is insufficient. It is, therefore,

Ordered, Adjudged and Decreed by the Court that the plea in abatement of the respondent, Brotherhood of Locomotive Firemen and Enginemen, an unincorporated association, be and it is hereby held to be insufficient and said respondent is hereby allowed twenty (20) days from this date within which to amend its plea if it so desires. It is, further, Ordered, Adjudged and Decreed by the Court that this cause be and it is hereby set for hearing on pleadings as herein noted, Monday, December 15, 1941, at 9:30 o'clock, A. M.; at said time should an amended plea be filed a sub-

[fol. 33] mission and argument will be had on the sufficiency of said plea and without prejudice to said Brotherhood of Locomotive Firemen and Enginemen, their demurrer will be submitted along with a submission on the demurrer of the other respondent, and then argued, if desired.

Done and Ordered, this the 12th day of November, 1941.

E. M. Creel, Circuit Judge, In Equity Sitting.

IN THE CIRCUIT COURT OF JEFFERSON COUNTY

DEMURRER OF L. & N. R. R. Co.—Filed November 12, 1941

Comes the defendant, Louisville & Nashville Railroad Company, and by and with leave and consent of the Court first had and obtained, demurs to certain aspects of said Bill of Complaint, as follows:

A

The defendant demurs to that aspect of the Bill of Complaint by which the complainant seeks as an individual the benefits of the alleged contract between the Railroad and the Locomotive Firemen and Hostlers of March 1, 1929, and as grounds of demurrer, assigns the following, separately and severally:

56. For that there is no equity in said aspect of said Bill.

57. For that the said complainant seeks the benefits of said contract and is unwilling to accept the provisions of said contract to his detriment.

58. For that if the said plaintiff is benefitted by the Brotherhood in the procurement for him of individual rights and benefits under the contract made by the Brotherhood, then he is obligated to accept and be governed by those provisions of the contract which place obligations on him.

59. For that under said contract of March 1, 1929, the benefits of which complainant seeks in this proceeding, the right to make and interpret contracts, rules, rates and working conditions for locomotive firemen and hostlers is vested in the legally constituted committee of the Brotherhood of Locomotive Firemen and Enginemen and the general officials of the Railroad.

60. In order for plaintiff to have as an individual the [fol. 34] benefits of the contracts made by the Brotherhood, he must be willing to abide by the other terms, provisions and conditions of said contract, and the right to make and interpret said contracts as vested in the Brotherhood.

B

And the defendant demurs to that aspect of the Bill by which he admits the legality of the creation and existence of the Brotherhood as a Collective Bargaining Agency for the firemen and is unwilling to abide by the action of said Agency, and as grounds therefor, assigns the following:

61. For that there is no equity in said aspect of the Bill.

62. For that said Bargaining Agency is shown to be a legally constituted agency of a majority of the employee firemen, and hostlers of the defendant Company, and their action binding on their own members and other firemen in the service of the railroad Company.

63. For aught that is shown by said Bill of Complaint, the said agreement between the Brotherhood and this defendant is in a furtherance of an effort on their part to maintain a harmonious and agreeable working relation between the said two parties concerning rates of pay, rules, and working conditions.

64. For that the averments of said Bill show that the Brotherhood was designated by the Firemen and Hostlers authorized to designate and select the Bargaining Agency without interference, influence or coercion by this defendant Railroad Company, and such agency clothed with authority to make and enter into contracts and interpretation thereof with the railroad Company.

65. The said Bargaining Agency is shown to have been organized and elected by the Firemen and Hostlers of the defendant Company, and that the said Brotherhood was legally elected as a representative of the said firemen for the purposes of the Railway Labor Act.

66. For that said Bill fails to allege or charge in any way that the defendant Railroad was in anywise responsible for failure of the said plaintiff to be a member of the Brotherhood organization.

67. For that said Bill fails to allege that the said contract is not in the interest of public welfare.

68. Said Bill fails to allege that any contracts between the Brotherhood and the railroad were not legally made and entered into.

[fol. 35]

C

To That Aspect of the Bill Charging the Defendant With Acting Pursuant to a Conspiracy Between the Railroad and the Brotherhood, the Defendant Demurs, and as Grounds of Demurrers, Assigns the Following, Separately and Severally:

69. For that there is no equity in said aspect of the Bill.

70. For that said Bill fails to allege any individual contractual obligation or duty to the plaintiff which it has breached.

71. For that said defendant has only negotiated and consummated contracts and agreements with the Brotherhood, the official representative of the Firemen, and this, under the Railway Labor Act, it was required and obligated to do.

72. Said Bill fails to allege that any duly authorized officials of the Railroad Company acting within the line, course and scope of their employment entered into or committed any act in conspiracy with the Brotherhood.

73. For that the said Railroad Company is in no wise responsible for the acts of the official of the Brotherhood.

74. Said complainant has no ground of recourse against the defendant Company for any alleged wrong done to him by the Brotherhood.

D

To That Aspect of the Bill Alleging the Restriction in Membership of the Brotherhood, the Defendant Assigns the Following Demurrers, Separately and Severally:

75. For that there is no equity in said aspect of the Bill as against this defendant.

76. For that by operation of law, the defendant is prohibited from participating in the policies and organization of the Brotherhood and in designating and determining its membership.

77. The said complainant has no right at law or equity to hold this defendant liable for any lack of interest in the welfare of the complainant by the Brotherhood.

88. Said defendant is not alleged to have been a party in anywise to conducting a secret negotiation and the duty of disclosing to the complainant negotiations had between the Brotherhood and the defendant Company is upon the [fol. 36] Brotherhood, and not upon the defendant Company.

89. For that any lack of promotion, or any failure of assignments to complainant is not shown to be the act of the defendant.

E

To That aspect of the Bill charging disloyalty or breach of alleged fiduciary duty to the complainant, the defendant demurs, and assigns the following grounds, separately and severally:

90. For that said aspect of the Bill is without equity as to this defendant.

91. For that under the averments of said Bill of Complainant, the said defendant Railroad, owes to the said complainant, no statutory duty, except to treat with the Brotherhood, the Collective or bargaining Agency and representative of a majority of the firemen and hostlers and the benefit of whose contract the plaintiff has accepted.

92. Under the averments of said bill, the defendant is under no fiduciary duty to the said complainant.

93. Said defendant is under no duty or obligation to disclose to the individual complainant all negotiations had by the defendant and the Brotherhood, and for any lack of disclosure of such negotiations by the Brotherhood, this defendant is in no wise responsible.

94. For that said Bill shows no act on the part of the defendant to destroy or impair any alleged vested property right of the complainant.

F

To that aspect of the Bill alleging the making of a contract or agreement of February 18, 1941, the defendant demurs on the following grounds, separately and severally:

95. For that there is no equity in said aspect of the Bill as to this defendant.

96. For that said defendant is not chargeable with any alleged secret and fraudulent act on the part of the said Brotherhood in its negotiations with the defendant for said contract.

97. The said defendant is not responsible to the complainant for the results to the complainant individually of said contract of February 18, 1941, and interpretation thereof.

White E. Gibson, Chas. E. Eyster, Attys. for L. & N. R. R. Co.

[fol. 37] In Circuit Court of Jefferson County

Amendment to Plea in Abatement by Brotherhood—Filed December 4, 1941

Comes the respondent, Brotherhood of Locomotive Firemen and Enginemen, and still appearing specially for the purpose of testing the jurisdiction of this Court over this cause of action and this party respondent, and for the purpose of pleading in abatement for no other purpose, amends its plea in abatement heretofore filed by inserting therein after Paragraph (4) the following:

(5) The Brotherhood of Locomotive Firemen and Enginemen is a voluntary association of persons employed as locomotive firemen and engineers at the time of admission to membership. It is a labor organization, or union, organized for the purpose of obtaining better wages and working conditions for its members, and not organized for trade or profit. It has more than nine hundred lodges located at terminal points on railroads, and more than ninety-five thousand members residing in every state of the United States and in every province of Canada.

Harold C. Heiss, Lange, Simpson, Brantley and Robinson, Attorneys for Brotherhood of Locomotive Firemen and Enginemen, Still appearing Specially as aforesaid.

Duly sworn to by D. B. Robertson. Jurat omitted in printing.

[fol. 38] IN CIRCUIT COURT OF JEFFERSON COUNTY

DEMURRER OF BROTHERHOOD—Filed December 15, 1941

I

Comes the respondent, Brotherhood of Locomotive Firemen and Enginemen, and demurs to the bill of complaint in this cause presented against it, as a whole, and as grounds of said demurrer sets down and assigns the following, separately and severally:

1. There is no equity in the Bill.

2. It affirmatively appears therefrom that this action is not maintainable against the members of this association generally.

3. For that it does not appear therefrom that this cause of action is a cause of action for or upon which the complainant therein may maintain such an action against the members of this organization or association.

4. For that it affirmatively appears therefrom that this is not a cause of action for or upon which the complainant therein may maintain such an action against the members of this organization or association.

5. For that the Bill of Complaint does not allege that the persons whose names appear on Exhibits 1 and 2 of the original Bill of Complaint as signing on behalf of the Brotherhood of Locomotive Firemen and Enginemen and Brotherhood of Locomotive Firemen and Enginemen Committee were authorized by the members of this association to execute the same document or that the execution of said document was ratified by the members of this association.

6. For that it affirmatively appears therefrom that the execution of the document constituting Exhibits 1 and 2 of said Bill of Complaint were neither authorized nor ratified by the members of this association.

7. For that it does not appear therefrom that the documents constituting Exhibits 1 and 2 of the said Bill of Complaint were executed for or on behalf of the members of this association.

8. For that it affirmatively appears therefrom that the documents constituting Exhibits 1 and 2 of said Bill of

Complaint were not executed for or on behalf of the members of this association.

[fol. 39] 9. For that the allegation that complainant is employed by the defendant, Louisville & Nashville Railroad Company, of the S. & N. A. Division, with seniority rights as a fireman is a conclusion of the pleader.

10. For that the averments of the Bill are not definite and certain enough to apprise this respondent what it is called upon to defend.

11. For that there are no facts alleged which show that complainant was entitled to seniority rights, nor is there any averment as to what seniority rights plaintiff was entitled.

12. For that it does not appear therefrom by what right plaintiff brings suit as a class suit on behalf of the other negro locomotive firemen on the defendant's railroad.

13. For that it affirmatively appears therefrom that the complainant has no right to maintain this Bill on behalf of the other negro firemen.

14. For that it appears therefrom that the measure and extent of complainant's damages as well as the class of complainant's damages is materially different from that of others constituting the class which he seeks to represent.

15. For that it does not appear therefrom that the complainant has the consent or authority of the class which he seeks to represent.

16. For that it does not appear therefrom that the other members of the class which complainant seeks to represent have seniority rights or that their rights have been affected in any way by the action complained of.

17. For that the said Bill of Complaint shows that said complainant is asking the benefits of the alleged contracts between the railroad and the locomotive firemen and hostler's schedules issued on March 1, 1929, and is unwilling to abide by the terms, provisions and conditions of the said alleged schedule or contract.

18. For that it does not appear therefrom that complainant, or any of the class which he seeks to represent, have

sustained any injuries or damages as a result of the action complained of.

[fol. 40] 19. For that there are not alleged therein any facts which make the alleged contract constituting Exhibit-1 and 2 of said Bill of Complaint illegal, unconscionable or unfair.

20. For that it affirmatively appears therefrom that both parties respondent were free contracting agencies and had right to make and enter into the contracts set out as Exhibits to the Bill.

21. For that the relief prayed for in the Bill would be an undue interference with the rights of the parties respondent to contract as they have a right to do.

22. For that there is a misjoinder of parties complainant in that complainant seeks to combine a personal claim for damages with a claim of the negro firemen of the class for equitable relief.

23. For that the interest and injuries of the negro firemen do not sufficiently appear to enable the Court to adjudicate their rights in the premises.

24. For that an action for damages cannot be brought on behalf of a class.

25. For that the decree prayed for by complainant on behalf of the class which he seeks to represent would be unenforceable.

26. For that no reason is alleged why this association cannot execute any contract if so desired for the benefit of its members.

27. For that said Bill fails to allege or to set out in substance or in haec verba the alleged schedule issued March 1, 1929, and Article 26 of said Schedule.

28. For that said Bill of Complaint shows that complainant is seeking to obtain the benefits of an alleged contract between the defendant company and this association as though he were a member of the said brotherhood or association, without the averment that he is a member of said brotherhood or association.

29. For that said Bill fails to allege what the alleged conspiracy was between the said railroad and this respondent.

30. For that said Bill does not allege facts sustaining the averment of conspiracy between the railroad and this respondent.

[fol. 41] 31. For that the allegation of the conspiracy between the railroad and this respondent is a conclusion of the pleader.

32. For that a corporation is incapable of entering into a conspiracy.

33. For that a voluntary association is incapable of entering into a conspiracy.

34. For that it is not alleged that any of the members of this association entered into a conspiracy or that they authorized, ratified or condoned a conspiracy.

35. For aught that appears therefrom, the members of this association had no knowledge and were not parties in any way to the said contracts.

36. For that it is not alleged that the persons whose names appear on the said contract or any of them were agents, servants or employees of the members of this association, acting within the line, scope and course of their employment as such.

37. For that the allegations that this association was acting as exclusive bargaining agent under the Railway Labor Act of June 21, 1934, is a conclusion of the pleader and no facts are alleged to support the said conclusion.

38. For that the conplainant has an adequate remedy at law.

39. For that the said Bill of Complaint shows on its face that if the complainant has suffered wrong, he has an adequate remedy at law against the respondent railroad company by way of damages for breach of contract.

40. For that there are no facts alleged showing that plaintiff will suffer irreparable injury by the wrongs complained of.

41. For that the said Bill of Complaints fails to allege any wrongdoing by this association.

42. For that the said Bill of Complaint fails to allege any wrongdoing by the members of this association or any of them.

43. For that no facts are alleged which show that this association or any of the members of this association * * * were under any duty to represent the complainants or any of them.

44. For that no facts are alleged to show any duty on any of the members of this association or any breach of any [fol. 42] duty by the members of this association.

45. For that it does not appear therefrom that the said agreements or contracts are in any way binding upon any of the complainants, or respondents, or either of them.

46. For that the remedy of complainants, if the defendant railroad has breached its contract or contracts with them, is at law by way of damages for breach of contract and for aught appearing from the said Bill of Complaint, said remedy would be entirely adequate.

47. For that no facts are alleged showing any right which equity will protect by injunction.

48. For that it is not alleged therein that the complainant, as a class were discriminated against by the said contract and it affirmatively appears therein that the classification made by said contract is reasonable.

49. For that the said Bill fails to allege that the alleged contract between the railroad and this association dated February 18, 1941, is illegal or unlawful in any respect.

50. It affirmatively appears therefrom that the said contract complained of by complainants was a contract which this respondent had a perfect right to negotiate, make, execute and to put into effect.

51. For that it affirmatively appears therefrom that complainant's remedy, if any, is by and through the administrative agencies set up by the said Railway Labor Act, and that the remedies therein prescribed are adequate.

52. For that it appears affirmatively therefrom that if complainants have any cause of action it is against the individuals who participated in the alleged wrong and not against the members of this association.

53. For that it affirmatively appears therefrom that there is no authority or warrant of law for the maintenance of this action against and in the name of this unincorporated organization or association.

54. For that the complainants ask equitable relief without submitting themselves to the jurisdiction of this Court and are not amenable to this Court and are not amenable to the process of this Court.

[fol. 43] 55. For that the record shows that this Court has no jurisdiction of the members of this association and has no power to render a decree affecting their individual rights.

56. For that it affirmatively appears that this Court has no jurisdiction to render a money decree against any of the members of this association or as against this association as such.

57. For that it affirmatively appears that the decree of this Court would be unenforceable as against the individual members of this association.

58. For that it affirmatively appears that this Court has no jurisdiction over the non-resident members of this association and cannot interfere with their freedom of contract.

59. For that this Court judicially knows that the members of this association are not liable for the tortuous acts of officers or agents of the association done without the authorization, approval or ratification of the said members.

60. For this Court judicially knows that the officers of this association have no power to bind the individual members of the said association in any way.

61. For that this association is not a proper party respondent to this Bill of Complaint.

62. For that this association is not a legal entity.

63. For that no affirmative relief can be granted against this unincorporated association on this cause of action.

64. For that the said Bill of Complaint is multifarious in that it seeks to combine in the one Bill of Complaint a great number of separate and individual causes of actions by various parties complainants, each standing on separate facts and circumstances and each demanding its own individual and separate class and degree of relief.

65. For that it affirmatively appears therefrom that the rights of the various parties complainants vary widely in the class and type of relief sought as well as the degree of the relief to which they are entitled and therefore the said Bill of Complaint is multifarious.

[fol. 44] 66. For that it is not shown thereby that the complainants or any of them will suffer irreparable injury by the putting into effect of the alleged contract.

67. For that it affirmatively appears therefrom that there are parties who are not made parties respondent to the Bill of Complaint and whose rights will be injuriously and adversely affected by the decree sought, and who are indispensable parties to this Bill of Complaint.

68. For that it appears that the white firemen who will be displaced by the relief sought are indispensable parties to this procedure.

II

And this respondent demurs to that aspect to said Bill of Complaint which prays a perpetual injunction and for grounds of said demurrer sets down and assigns the following:

1. There is no equity in the said aspect of the Bill of Complaint.

2. It affirmatively appears that complainants have an adequate remedy at law.

3. For that the rights which complainants claim therein are not rights which equity will protect by injunction.

4. For that it affirmatively appears that a decree in conformance with the prayer for an injunction would be unenforceable.

5. For that a decree in conformance with the prayer for an injunction would not be enforceable as against the members of this association.

6. For that this Court has no sufficient jurisdiction to render a decree enjoining the members of this association from doing the things and matters complained of therein.

7. For that the granting of the relief prayed for therein as against this respondent would constitute a denial of due process of law.

8. For that it does not appear therefrom that the members of this association, or any of them, participated in any way in the wrongful acts complained of or that the members of this association or any of them in any way authorized, ratified or approved of such action.

[fol. 45] 9. For that the same is not a cause of action for or upon which the complainant therein may maintain such an action against the members of this organization or association.

10. For that the relief therein prayed, if granted, would not be enforceable as against the members of this association.

11. For that it affirmatively appears therefrom that there are parties who are not made parties respondent to the Bill of Complaint and whose rights will be injuriously and adversely affected by the decree sought, and who are indispensable parties to this Bill of Complaint.

12. For that it appears that the white firemen who will be displaced by the relief sought are indispensable parties to this procedure.

III

And this respondent demurs to that aspect of the Bill of Complaint which seeks a discovery and for grounds of said demurrer sets down and assigns the following:

1. For that there is no equity in the said aspect of the Bill.

2. For that it affirmatively appears therefrom that the complainants have an adequate remedy at law.

3. For that complainants show no right to a discovery.

4. For that the allegations of the said aspect of the bill are so vague, indefinite and uncertain and the prayer thereof, is so vague, indefinite and uncertain that this re-

spondent is not apprised of what it is called upon to defend or what it is called upon to produce in the way of a discovery.

5. For that the said allegations of the said aspect of the Bill are so vague, indefinite and uncertain that this respondent is not apprised thereby of what information the said complainants are seeking or what information they are entitled to.

6. For that the same is not a cause of action for or upon which the complainant therein may maintain such an action against the members of this organization or association.

7. For that the relief therein prayed, if granted, would not be enforceable as against the members of this association.

8. For that no facts are alleged which show that the members of this association have the information, a discovery of which is prayed.

[fol. 46] 9. For that there is alleged no duty on the part of the members of this association to give the complainants, or any of them, a discovery of the information therein sought.

10. For that it does not appear therefrom that the members of this association, or any of them, participated in any way in the wrongful acts complained of or that the members of this association or any of them in any way authorized, ratified, or approved of such action.

IV

And this respondent demurs to that aspect of the Bill of Complaint which seeks restoration of plaintiff's and other negro locomotive firemen's rights and recognition of the same apart from the certain alleged agreement and for grounds of said demurrer sets down and assigns the following:

1. There is no equity in the said aspect of the Bill.

2. For that it affirmatively appears that the complainants have an adequate remedy at law.

3. For that it affirmatively appears that complainant's remedy, if any, is at law against the respondent railroad for damages for breach of contract.

4. For that the said relief therein prayed, if granted, would not be enforceable as against this respondent.

5. For that the relief therein prayed for, if granted, would not be enforceable as against the members of this association.

6. For that it affirmatively appears therefrom that the cause of action therein set up is not a cause of action for or upon which the plaintiff therein may maintain such an action against the members of this organization, or association.

7. For that it does not appear that the members of this organization or association participated in any way in the wrongful acts complained of therein or that they authorized, ratified or approved the said actions in any way.

7a. For that it affirmatively appears therefrom that this respondent cannot restore plaintiff's alleged position with the respondent railroad company and any decree rendered against this respondent would be effectual.

8. For that it affirmatively appears therefrom that there are parties who are not made parties respondent to the Bill [fol. 47] of Complaint and whose rights will be injuriously and adversely affected by the decree sought, and who are indispensable parties to this Bill of Complaint.

9. For that it appears that the white firemen who will be displaced by the relief sought are indispensable parties to this procedure.

V

And this respondent demurs to that aspect of the Bill of Complaint which seeks an injunction against this respondent enjoining it and its members and each of them from purporting to act as representatives under the Railway Labor Act for all of the locomotive firemen on the defendant railroad and for grounds of said demurrer, sets down and assigns the following:

1. There is no equity in the said aspect of the bill.

2. For that it affirmatively appears therefrom that the complainants have an adequate remedy at law.

3. For that it affirmatively appears from the allegations thereof that this association has a right under the said Rail-

way Labor Act to act as representative for all the locomotive firemen on the said defendant railroad.

4. For that this Court has no power to bind the members of this association by any decree rendered in this cause.

5. For that it affirmatively appears therefrom that this is not a cause of action for or upon which the complainants therein may maintain such a cause of action against the members of this association or organization.

6. For that it affirmatively appears therefrom that there are parties who are not made parties respondent to the Bill of Complaint and whose rights will be injuriously and adversely affected by the decree sought, and who are indispensable parties to this Bill of Complaint.

7. For that it appears that the white firemen who will be displaced by the relief sought are indispensable parties to this procedure.

VI

And this respondent demurs to that aspect of the Bill of Complaint which seeks a declaratory judgment and for grounds of said demurrer, sets down and assigns the following:

1. There is no equity in the said aspect of the Bill.

[fol. 48] 2. For that it affirmatively appears therefrom that the complainants have an adequate remedy at law.

3. For that it affirmatively appears therefrom that this is not a cause of action for or upon which the complainants therein may maintain such an action against the members of this association.

4. For that it affirmatively appears therefrom that there are parties who are not made parties respondent to the Bill of Complaint and whose rights will be injuriously and adversely affected by the decree sought, and who are indispensable parties to this Bill of Complaint.

5. For that it appears that the white firemen who will be displaced by the relief sought are indispensable parties to this procedure.

6. For that it does not appear therefrom that there is any justiciable controversy between the complainants or any of them and the members of this association.

7. For that it does not appear that there is any justiciable controversy between complainants and this respondent.

8. For that it affirmatively appears that an adequate relief and an appropriate remedy are presently available to the complainants through other existing forms of action or proceedings.

VII

And this respondent demurs to that aspect of the Bill of Complaint which seeks damages against this brotherhood and for grounds of said demurrer, sets down and assigns the following:

1. For that there is no equity in the said aspect of the Bill.

2. For that it affirmatively appears therefrom that the complainants have an adequate remedy at law.

3. For that it affirmatively appears therefrom that this is not a cause of action for or upon which the complainants therein may maintain such an action against the members of this association.

4. For that it is not alleged therein that the members of this association participated in any way in, or in any way ratified, confirmed or approved the said action complained of.

5. For that it does not appear therefrom that the said contracts were negotiated or executed by agents, servants or employees of the members of this association acting [fol. 49] within the line and scope of their employment.

6. For that there is no authority or warrant of law for the awarding of damages to a class.

7. For that there is no authority or warrant of law for the awarding of a decree requiring affirmative action on the part of the respondent in favor of a class.

VIII

And this respondent demurs to that aspect of the bill of complaint which seeks relief on behalf of the other negro locomotive firemen of the defendant railroad as a class, and for grounds of said demurrer, sets down and assigns the following:

1. For that there is no equity in the said aspect of the bill.

2. For that it affirmatively appears that the complainants have an adequate remedy at law.

3. For that it does not appear therefrom that the complainant has the authority to represent said class.

4. For that it does not appear therefrom that the interests of the class which the complainant seeks to represent are identical with his own.

5. For that it affirmatively appears therefrom that the rights of the various parties sought to be represented by class are widely variant as to the class and type of relief to which they are entitled, if any, and also as to the degree of relief to which they are entitled.

6. For that it affirmatively appears therefrom that this is not a cause of action for or upon which the complainants therein may maintain such an action against the members of this association.

7. For that there is no authority or warrant of law for the awarding of damages to a class.

8. For that there is no authority of warrant of law for the awarding of a decree requiring affirmative action on the part of the respondent in favor of a class.

9. For that it affirmatively appears therefrom that there are parties who are not made parties respondent to the bill of complaint and whose rights will be injuriously and adversely affected by the decree sought, and who are indispensable parties to this bill of complaint.

10. For that it appears that the white firemen who will be displaced by the relief sought are indispensable parties to this procedure.

[fol. 50] Lange, Simpson, Brantley & Robinson, Solicitors for Respondent, Brotherhood of Locomotive Firemen and Enginemen, an unincorporated association.

In Circuit Court of Jefferson County

Minute Entry of Submission of Demurrers and Amended Plea in Abatement—December 15, 1941

On this the 15th day of December, 1941, it is ordered by the Court that this cause be submitted for decree on the demurrers to Bill and amended Plea in Abatement.

In Circuit Court of Jefferson County

Decree Sustaining Demurrers—January 21, 1942

This cause coming on to be heard was submitted for decree on the separate and several demurrers of respondents filed separately and severally to the Bill of Complaint:

And upon consideration it is held that the said demurrers are well taken. It is therefore Ordered, Adjudged and Decreed by the Court that said demurrer be and the same are hereby separately and severally sustained and the complainant is allowed thirty days from this date in which to amend.

Done and Ordered this the 21st day of January, 1942.

E. M. Creel, Circuit Judge, In Equity Sitting.

In Circuit Court of Jefferson County

Decree Holding Plea in Abatement Insufficient—January 21, 1942

This Cause coming on to be heard is submitted for a ruling on the sufficiency of the Plea in Abatement as amended of respondent, Brotherhood of Locomotive Firemen and Enginemen, and the Court having considered and understood same is of the opinion that it is insufficient. It is, therefore,

Ordered, Adjudged and Decreed by the Court that said Plea in Abatement as last amended, of respondent, Brotherhood of Locomotive Firemen and Enginemen, is insufficient and said Plea in Abatement is hereby dismissed.

[fol. 51] Done and Ordered, this the 21st day of January, 1942.

E. M. Creel, Circuit Court, In Equity Sitting.

IN CIRCUIT COURT OF JEFFERSON COUNTY

ORDER EXTENDING TIME TO AMEND COMPLAINT—Filed February 20, 1942

It is Ordered, Adjudged and Decreed that the complainant be and he is hereby granted to and including March 3, 1942 to amend his Bill of Complaint.

Done and Ordered, this the 20th day of February, 1942.

J. Russell McElroy, Circuit Judge, In Equity Sitting.

IN CIRCUIT COURT OF JEFFERSON COUNTY

AMENDED COMPLAINT—Filed February 20, 1942

To the Honorable Judge or Judges of Said Court:

1. Your complainant shows unto your Honor that he is a resident of Jefferson County, Alabama, and is over twenty-one years of age; that respondent Louisville & Nashville Railroad Company is a corporation, incorporated in the State of Kentucky but engaged in interstate commerce by rail in the State of Alabama; that the respondent Brotherhood of Locomotive Firemen and Enginemen is a national unincorporated labor union whose membership is principally derived from locomotive firemen and enginemen employed on interstate railroads, including the defendant railroad. It is composed of a Grand Lodge and over nine hundred subordinate lodges throughout the country, including lodges, officers, and members resident in the State of Alabama and Jefferson County. By constitution, practice and ritual its membership is restricted to white men, all Negro firemen being excluded solely because of race.

2. Complainant is a negro fireman, aged 55, in perfect health, employed by the defendant railroad on the S. & N. A. seniority division, with seniority rights dating from February 4, 1910, and with an excellent service record. He brings this action personally in his own behalf and as a class suit representing and in behalf of all the other negro firemen on the defendant railroad, said other negro locomotive firemen constituting a class so numerous as to make it impracticable to bring them all before the Court, and there be- [fol. 52] ing common questions of law and fact, common

grievances and common relief sought as well as special relief sought.

3. Respondent railroad has employed plaintiff and plaintiff is working for it as a locomotive fireman under his individual contract of employment which embodies the standard terms of the collective bargaining agreement negotiated between the railroad and the defendant Brotherhood acting for all the locomotive firemen and hostlers on said railroad, and known as the Firemen and Hostlers Schedule issued March 1, 1929. By the terms of his contract of employment defendant railroad grants to plaintiff the security of permanent tenure in its service during good behaviour, and establishes seniority rights on each division with provision (Art. 26) that the oldest firemen in road service will have the preference of runs and promotion on the seniority territory to which assigned, when competent and worthy. Plaintiff states that at all times material herein he was a fireman in road service, wholly competent and worthy for the service to which his seniority entitled him to, and a faithful, loyal and efficient fireman in all respects. Plaintiff's employment status is a vested property right and his seniority rights under said status have a special value in view of his advanced years and length of service with the defendant railroad.

4. At all times material herein prior to April 7, 1944, plaintiff was employed in the "pool" of locomotive firemen on the defendant railroad's S. & N. A. seniority division. By the terms of his contract embodying the standard provisions of the collective agreement aforesaid the mileage earnings of firemen in the pool have a minimum guarantee, which amounted for plaintiff on an average between 4,100 to 4,500 miles per month at the rate of $5.75 or $5.51 per hundred miles according to the class of engine he was firing. Plaintiff's monthly pay check while working in the "pool" was about $225.00, after deducting $7.65 for insurance, $2.60 for hospital fund, and $3.00 per $100.00 for retirement. By virtue of his seniority he was holding down one of the best assignments in said seniority district (the S. & N. A. Division constituting in itself a seniority territory within the meaning of Article 26 aforesaid.) Firemen are eligible to "bid" for placement in the "pool" according to their relative seniority except as noted below.

[fol. 53] 5. The vast majority of the locomotive firemen employed by the defendant railroad are white and members of the defendant Brotherhood; and all the white firemen who at any time material herein have been or are now members of the "pool" on the S. & N. A. seniority division are members of the defendant Brotherhood. By force of having a majority of the entire craft or class of locomotive firemen on the defendant railroad the white members of the Brotherhood since the passage of the Federal Railway Labor Act of June 21, 1934 (U. S. Code, Title 45, Ch. 8) have designated said Brotherhood as the exclusive bargaining agent and grievance representative for the entire craft or class of firemen on the defendant railroad, including the minority negro locomotive firemen which the Brotherhood excludes from membership solely on account of race or color. By virtue of said Railway Labor Act the minority negro locomotive firemen, including plaintiff, have been compelled to accept the defendant Brotherhood as their exclusive bargaining agent and grievance representative in dealings with the defendant railroad; and they have so accepted defendant Brotherhood within the limitations of the lawful exercise of its powers.

6. Respondent Brotherhood is herein sued in its own right as bargaining representative of plaintiff and the other minority negro firemen under said Railway Labor Act, and further as representative of all the white member firemen employed on the defendant railroad, particularly the white member firemen who are employed in the "pool" on the S. & N. A. seniority division.

7. By the terms of the covering contract of March 1, 1939 aforesaid (which forms part of plaintiff's employment contract) the right to make and interpret contracts, rules, rates and working conditions is vested in the regularly constituted Committee of the Brotherhood and the general officials of the railroad; local officials are forbidden to enter into local agreements with local committee or with any individual fireman or hostler in conflict with said covering contract without the approval of the general officials of the railroad and the general chairman of the Brotherhood; and the life of the contract is expressly made subject to 30 days notice by either the railroad or the Brotherhood. By virtue of their membership and further

by virtue of their nomination of the Brotherhood as bargaining agent under the Railway Labor Act, the white firemen, including the white firemen in the "pool" on the S. & N. A. seniority division have expressly made the Brotherhood their representative for all matters affecting con-[fol. 54] tracts, rules, rates and working conditions.

8. The white firemen members of the defendant Brotherhood not only constitute a majority of the firemen on the defendant Railroad but also constitute a majority of the firemen on each of the railroads listed in the Notice dated March 28, 1940 to the Southeastern Carriers Conference attached to this amended complaint as "Exhibit A"; and on each said railroad have designated and established said Brotherhood as the exclusive bargaining agent and grievance representative for the entire craft or class of firemen on said railroad, including the minority non-member negro firemen. The Brotherhood has asserted to act under color of said Railway Labor Act not only in the matter of adjusting general conditions of work but also in handling and regulating all rules, rates of pay, contract terms and working conditions of the individual employment contracts between the carrier and the individual fireman; and has asserted exclusive and unrestricted dominion over the individual contract of the negro firemen on the defendant railroad, including plaintiff's individual contract of employment.

9. Defendant Brotherhood has not exercised its powers of representation under the Railway Labor Act aforesaid loyally, impartially and in good faith with respect to the minority non-member negro firemen; but has constantly discriminated against them in an effort to obtain for its white member firemen a monopoly of employment on all railroads, including defendant railroad, and gradually to eliminate the negro firemen from employment thereon. To that end it has over a period of fifteen years secretly negotiated with said railroads, including the defendant railroad, a series of agreements and modifications of agreements placing *every* increasing strictures on the employment of negro firemen and curtailing and destroying their seniority rights and other vested rights under their individual employment contracts, to the preferential advantage of their own white member locomotive firemen. As a direct consequence of the Brotherhood's persecution the employment

of negro firemen on all railroads, including the defendant railroad, has greatly declined, their job assignments have become less frequent and more irregular, their work more hazardous and burdensome both individually, and as a class as compared with the employment, job assignments and work of the white member locomotive firemen.

10. Defendant Brotherhood in functioning as sole and exclusive bargaining agent and grievance representative under the Railway Labor Act, particularly sections 151a and 152, Title 45, U. S. Code of the entire craft or class of fire-[fol. 55] men on the defendant railroad, at all times owes a statutory and fiduciary duty to each individual locomotive fireman, including plaintiff and the other negro non-member locomotive firemen, to represent him loyally and in good faith, not to seek a monopoly or other special advantage for its own members against the non-members, to stand impartial between all the firemen, to make full disclosure of all negotiations and other proposed actions affecting the individual fireman's rate of pay, rules and working conditions, to give reasonable notice, opportunity to be heard, and a chance to vote to the individual fireman on any action proposed, and full and prompt report on all action taken affecting his interests, and generally to conform to and respect the rules of law and standards of conduct governing the relationship of principal and agent as the statutory agent of said individual fireman by designation of the majority of the craft or class of firemen under said Railway Labor Act. Nevertheless in flagrant violation of its duties in the premises so far as plaintiff and the other negro non-member locomotive firemen on defendant and the other railroads are concerned, the defendant Brotherhood has persistently been unfaithful to its fiduciary duty and agency relationship, has been and is now disloyal to him and them, has sought to force him and them out of employment and destroy their respective seniority rights in an effort to obtain for its own members a monopoly of employment, or failing that the most favored job assignments and best conditions of work regardless of merit or seniority. It has refused and still refuses to notify plaintiff and the negro non-member firemen of proposed actions affecting his or their interests, to report its deeds done as his or their bargaining representative or to handle his or their grievances, and has refused and still refuses to give

him or them fair, honest and faithful representation under said Railway Labor Act.

11. At all times material herein all the responsible officials of the defendant railroad, specifically the Director of Personnel, a general officer, and his staff, have been and are fully acquainted with the attitude and attempts of the Brotherhood to obtain a monopoly of employment and most favored conditions for its own white member firemen against plaintiff and the minority non-member negro firemen.

[fol. 56] 12. In execution of its discriminatory scheme aforesaid under date of March 28, 1940, the defendant Brotherhood without notice to plaintiff or the other negro firemen, or without giving them a chance to protest or otherwise protect themselves, served on the Southeastern Carriers, including defendant railroad, a thirty — notice to amend all existing agreements and employment contracts of the firemen on said roads, including the individual contracts of plaintiff and the other negro non-member firemen, in such a way as to destroy their vested seniority rights by providing that only promotable men would be employed as firemen on other than steam power, that when new runs or jobs should be established in any service only promotable firemen would be assigned, or the same in case of permanent vacancies or established runs or jobs. (See further "Exhibit A" hereto which is prayed to be read in full herewith). According to existing railroad practice promotable men means white men; negroes being known as non-promotable men and being the only group of firemen so designated. All the general officials of the defendant railroad knew that said notice proposed a modification of existing contracts prejudicial to the existing individual contracts between the defendant railroad and its negro firemen, including plaintiff; knew the motive of the defendant Brotherhood was to try to drive the negro locomotive firemen out of employment and to take away the benefits of their vested seniority rights.

13. Nevertheless in spite of such knowledge of the purpose and motive of the defendant Brotherhood, without notice to the plaintiff or the other negro locomotive firemen employed by it, defendant railroad acting by and through its general officers who were then and there acting

in the course of and within the scope of their employment and in prosecution of the business of the defendant railroad did conspire with the defendant Brotherhood, and well knowing that the effect of said agreement would be to destroy the vested seniority rights of plaintiff and the other minority negro firemen or seriously curtail the exercise of the same, did execute with said Brotherhood the so-called "Washington Agreement" dated February 18, 1941, effective February 22, 1941; and the modification of said agreement dated Louisville, Kentucky May 12, 1941. (Copies of said Agreement and modification are already attached to the original complaint herein filed, and now designated as Exhibits "B" and "C" respectively to this [fol. 57] amended complaint are incorporated herein by reference and prayed to be read in full herewith).

12. By the terms of said "Washington Agreement" the proportion of non-promotable firemen on other than steam power shall not exceed fifty per cent in each class of service; but even then the agreement did not sanction the employment of non-promotable men on any seniority district on which non-promotable men were not employed at the date of the agreement; and further until such percentage should be reached all new runs and all vacancies created by death, dismissal, resignation or disqualification should be filled by promotable men.

13. In addition the agreement provided that the representatives of the employees did not waive and were not to be considered prejudiced in the right to request further agreements or modifications of agreements still more narrowly restricting the employment of helpers on other than steam power on any railroad to promotable men, meaning white men to the exclusion of negroes.

14. Although the "Washington Agreement" applied only to firemen and helpers on power other than steam power, yet the defendant Brotherhood acting through its General Chairman for the defendant railroad who was then and there purporting to act within the scope and course of his employment as bargaining agent under the Railway Labor Act for all the firemen on the defendant railroad including plaintiff and the other negro firemen, and the defendant railroad acting through its general officers the Director of Personnel and Assistant Directors of Personnel

who were then and there purporting to execute the business of the railroad and were acting within the scope and course of their employment, did broaden the scope of said Agreement and did modify and extend the same to include all power and to restrict the seniority rights of plaintiff and the other negro firemen on steam locomotives; and they did confederate together to destroy and curtail plaintiff's vested seniority rights, as more fully evidenced in detail by the terms of said modification (See Exhibit "C").

15. Although the negro firemen constitute the minority group of firemen on the entire defendant railroad system, they constitute the majority group of the S. & N. A. seniority division to which plaintiff is assigned and in which he has his vested seniority rights. The negro firemen constitute [fol. 58] about eighty per cent or more of the total firemen on said division; and up to the making of the "Agreement" and modification aforesaid had exercised their vested seniority rights without discrimination.

16. Under existing railroad practice on the defendant railroad when a train is taken out of service which has been pulled by a locomotive fired by a fireman taken from the "pool" the same is considered as changing the "pool" to the extent of placing the positions in the same up for competitive bidding by the firemen on the basis of seniority.

17. Shortly before April 7, 1941, the defendant railroad took a train out of service which was pulled by a locomotive fired by a fireman taken from the "pool", and as a consequence the jobs in the "pool" were advertised for bids. By virtue of his seniority plaintiff was entitled to one of the "pool" jobs but because of his race, and solely because of his race, he was without cause and in spite of the fact that by seniority, competence and worth he was entitled to the same, he was denied a job in the "pool" on the strength of said "Agreement" and modification. By such action the defendant railroad violated its employment contract with him and breached his seniority rights. In his place the defendant Brotherhood and the defendant railroad caused a white fireman junior to him and a member of the Brotherhood to be placed in the "pool", in pursuance of the conspiracy aforesaid and the campaign of the Brotherhood to seek preferential advantages for its own members at the expense of the non-member negro firemen.

18. In consequence of the wrongful acts of the defendants plaintiff's earnings have been reduced over $50.00 per month, his work assignments have been more burdensome and hazardous, his hours of employment have been longer and his enforced absence from home more prolonged. His vested retirement rights under the Railway Retirement Act of June 24, 1937 (U. S. Code, Title 45, Ch. 9) have been seriously impaired and will be irreparably damaged unless this Court grants relief.

19. Plaintiff has exhausted his remedies within the Brotherhood and the railroad to the point where he is lawfully entitled to seek relief at the hands of this Court. He has appealed to the highest operating officer of the defendant railroad with jurisdiction in the premises, and to the general chairman of the defendant Brotherhood representing, or [fol. 59] supposed to represent and employed to represent under the Railway Labor Act, all the firemen on the defendant railroad. Nevertheless he has been denied all relief by the Railroad and the Brotherhood, and said wrongs have continued, now exist and will continue to exist and grow worse unless restrained by this Court. Legal relief by way of damages are inadequate for full redress of his wrongs suffered. The seniority rights of the other negro firemen on the defendant railroad have been similarly curtailed or threatened by defendant railroad and defendant Brotherhood under said "Agreement" and modification.

Wherefore Premises Considered, the defendants being already before this Court by process lawfully served upon them plaintiff prays that they be required to plead, answer or demur hereto within the time prescribed by law, and further prays that:

1. He be granted a permanent injunction against each defendant perpetually enjoining them and each of them from enforcing or otherwise recognizing the said "Agreement" or modification thereof:

2. Discovery by the Brotherhood of all agreements and negotiations undertaken by it with the defendant railroad since the enactment of the Railway Labor Act of 1934 in which it purported to act as the exclusive bargaining agent for all the locomotive firemen on the defendant railroad under said Act, which have resulted in its occupying a hostile position or having conflicting interests with plaintiff

and the other non-member negro firemen regarding rates of pay, rules or working conditions;

3. Restoration of plaintiff's and other negro firemen's seniority rights and recognition of the same apart and independent of said "Agreement" and modification thereof;

4. A permanent injunction against the defendant Brotherhood, its officers, subordinate lodges, members, agents, or attorneys perpetually enjoining them and each of them from purporting to act as representative of plaintiff or the other negro firemen on the defendant railroad, so long as it or any of them refuse to give plaintiff and the other negro firemen notice, opportunity to be heard and a vote on all matters affecting them individually or in common with the other locomotive firemen on defendant railroad as a craft or class.

[fol. 60] 5. A decree binding all parties and their privies and those represented herein, settling, declaring and defining the rights, interests and other legal relations of the parties in and to and by reasons of the matters herein controverted;

6. Damages against the Brotherhood for loss of wages, destruction of vested seniority preference rights, and breach of its fiduciary and statutory duty as exclusive bargaining agent and grievance representative under the Railway Labor Act and the other injuries set forth in the sum of Fifty Thousand ($50,000.00) dollars in favor of plaintiff;

7. Relief for the other negro locomotive firemen on the defendant railroad as a class in the same manner as prayed for by plaintiff individually, so far as their interests may appear;

8. General relief.

Arthur D. Shores, 1630 Fourth Ave., N. Birmingham; J. T. Settle, 145 Beale Ave., Memphis, Tenn.; Charles H. Houston, Joseph C. Waddy, 615 F. Street, N. W., Washington, D. C.; By Charles H. Houston, Attorneys for Plaintiff.

CERTIFICATE OF SERVICE

I, Charles H. Houston, do hereby certify that prior to filing this amended Complaint and at the same time the original was forwarded to the Clerk of the Court, I mailed a

copy, postage prepaid, to Lange, Simpson, Brantley & Robinson, Esquires, Attorneys for the defendant Brotherhood, Nelson Building, Birmingham, Alabama; and to, Gibson & Gibson, Esquires, White Gibson, Esquire, Chas. H. Eyster, Attorneys for the defendant Railroad, Birmingham, Alabama.

Washington, D. C., February 19, 1942.

Charles H. Houston.

[fol. 61] EXHIBIT "A" TO AMENDED COMPLAINT

Brotherhood of Locomotive Firemen and Enginemen

General Grievance Committee

Railway,
March 28, 1940.

Mr. —— ——, ——.

DEAR SIR:

This is to advise that the employees of the Railway engaged in service, represented and legislated for by the Brotherhood of Locomotive Firemen Enginemen, have approved the presentation of request for the establishment of rules governing the employment and assignment of locomotive firemen and helpers, as follows:

1. Only promotable men will be employed for service as locomotive firemen or for service as helpers on other than steam power.

2. When new runs or jobs are established in any service, only promotable firemen or helpers will be assigned to them.

3. When permanent vacancies occur or established runs or jobs in any service, only promotable firemen or helpers will be assigned to them.

4. It is understood that promotable firemen or helpers on other than steam power or those in line for promotion under the present rules and practices to the position of locomotive engineer.

In accordance with the terms of our present agreement, and in conformity with the provisions of the Railway Labor

Act, kindly accept this as the required official notice of our desire to revise the agreement to the extent indicated.

The same request as this date being presented on the following railroads:

Atlantic Coast Line
Jacksonville Terminal
Atlanta Joint Terminal
Atlanta & West Point
Western Railroad of Ala.
Central of Georgia
Louisiana and Arkansas
Mobile and Ohio, Columbus & Greenville
Norfolk & Postmouth Belt
Norfolk & Southern
Norfolk & Western
[fol. 62] Frankfort & Cincinnati
Georgia Railroad
Georgia & Florida
Gulf, Mobile & Northern
Louisville & Nashville
Memphis Union Station Co.
Seaboard Airline
Southern Railroad System
St. Louis-San Francisco
Tennessee Central

It is our request that all lines or division of railway controlled by the Railway shall be included in settlement of this proposal and that any agreement reached shall apply to all alike on such lines or divisions.

It is desired that reply to our proposal be made in writing to the undersigned on or before April 7, concurring therein, or fixing a date within 30 days from date of this letter when conference with you may be had for purpose of discussing the proposal. In event settlement is not reached in conference it is suggested that this railroad join with others in authorizing a conference committee to represent them in dealing with this subject. In submitting this proposal we desire that it be understood that all rules and conditions in our agreements not specifically affected by our proposition shall remain unchanged subject to change in the future by negotiations between the proper representatives as has been the same in the past.

Yours truly, (Signed) General Chairman.

[fol. 63] In Circuit Court of Jefferson County

Demurrer of L. & N. R. R. Co. Refiled to Bill as Last Amended—Filed March 10, 1942

Comes the respondent, Louisville & Nashville Railroad Company, a corporation, and refiles its demurrer heretofore filed to complainant's original bill of complaint, so that said demurrer shall be filed against complainant's bill of complaint as last amended.

Chas. H. Eyster, and Gibson and Gibson, Solicitors for respondent, Louisville and Nashville Railroad Company, a corporation. By White E. Gibson.

In Circuit Court of Jefferson County

Demurrer of Brotherhood to Amended Bill—Filed March 17, 1942

I

Comes the Brotherhood of Locomotive Firemen and Enginemen, one of the respondents in the above cause, and demurs to the amended bill of complaint in this cause presented against it as a whole, and as grounds of said demurrer, sets down and assigns the following, separately and severally:

1. For that it does not appear therefrom that the individuals who negotiated the alleged contracts attached as exhibits to said amended bill of complaint were agents, servants or employees of the members of this association generally, and were acting in the line and scope of their employment as such.

2. For that it does not appear therefrom with sufficient certainly that the individuals who negotiated and executed the alleged contracts were, at the time, acting within the line and scope of their authority as agents, servants or employees of this association.

3. For that it does not appear therefrom with sufficient certainty that the individuals who negotiated and executed said contracts were, at the time, acting as agents, servants or employees of the members of this association within the line and scope of their authority as such.

4. For that there does not appear therefrom any reason why this association or the members thereof should be held accountable for the actions of the statutory representatives [fol. 64] under the Railway Labor Act.

5. For that the allegation that complainant's contract embodied the standard provisions of the Firemen's and Hostlers' Schedule issued March 1, 1929, is a conclusion of the pleader.

6. For that the allegation that the complainant's employment status is a vested property right is a conclusion of the pleader.

7. For that the allegation that the white members of the Brotherhood have designated said Brotherhood as the exclusive bargaining agent and grievance representative for the entire craft or class of firemen on defendant railroad is a conclusion of the pleader.

8. For that the averments thereof are so vague, indefinite and uncertain that this respondent is not sufficiently apprised as to what actions on its part are complained of by the various parties complainant.

9. For that it does not appear with sufficient certainty who was the designated bargaining agent for the entire craft or class under the Railway Labor Act.

10. For that it does not appear that this association has ever been certified as the exclusive bargaining agent under the Railway Labor Act.

11. There is no equity in the amended bill.

12. It affirmatively appears therefrom that this action is not maintainable against the members of this association generally.

13. For that it does not appear therefrom that this cause of action is a cause of action for or upon which the complainant therein may maintain such an action against the members of this organization or association.

14. For that it affirmatively appears therefrom that this is not a cause of action for or upon which the complainant therein may maintain such an action against the members of this organization or association.

15. For that the amended bill of complaint does not allege that the persons whose names appear on Exhibit 1 and 2 of the original bill of complaint as signing on behalf of [fol. 65] the Brotherhood of Locomotive Firemen and Enginemen and Brotherhood of Locomotive Firemen and Enginemen Committee were authorized by the members of this association to execute the said document or that the execution of said document was ratified by the members of this association.

16. For that it affirmatively appears therefrom that the execution of the document constituting Exhibits 1 and 2 of said amended bill of complaint were neither authorized nor ratified by the members of this association.

17. For that it does not appear therefrom that the documents constituting Exhibits 1 and 2 of the said amended bill of complaint were executed for or on behalf of the members of this association.

18. For that it affirmatively appears therefrom that the documents constituting Exhibits 1 and 2 of said amended bill of complaint were not executed for or on behalf of the members of this association.

19. For the allegation that complainant is employed by the defendant, Louisville & Nashville Railroad Company, on the S. & N. A. Division, with seniority rights as a firemen is a conclusion of the pleader.

20. For that the averments of the amended bill are not definite and certain enough to apprise this respondent what it is called upon to defend.

21. For that there are no facts alleged which show that complainant was entitled to seniority rights, nor is there any averment as to what seniority rights plaintiff was entitled.

22. For that it does not appear therefrom by what right plaintiff brings suit as a class suit on behalf of the other negro locomotive firemen on the defendant's railroad.

23. For that it affirmatively appears therefrom that the complainant has no right to maintain this amended bill for behalf of the other negro firemen.

[fol. 66] 24. For that it appears therefrom that the measure and extent of complainant's damages as well as the

class of complainant's damages is materially different from that of others constituting the class which he seeks to represent.

25. For that it does not appear therefrom that the complainant has the consent or authority of the class which he seeks to represent.

26. For that it does not appear therefrom that the other members of the class which complainant seeks to represent have seniority rights or that their rights have been affected in any way by the action complained of.

27. For that the said amended bill of complaint shows that said complainant is asking the benefits of the alleged contracts between the railroad and the locomotive firemen and hostler's schedules issued on March 1, 1929, and is unwilling to abide by the terms, provisions and conditions of the said alleged schedule or contract.

28. For that it does not appear therefrom that complainant, or any of the class which he seeks to represent, have sustained any injuries or damages as a result of the action complained of.

29. For that there are not alleged therein any facts which make the alleged contract constituting Exhibit 1 and 2 of said amended bill of complaint illegal, unconscionable or unfair.

30. For that it affirmatively appears therefrom that both parties respondent were free contracting agencies and had right to make and enter into the contracts set out as Exhibits to the amended bill.

31. For that the relief prayed for in the amended bill would be an undue interference with the rights of the parties respondent to contract as they have a right to do.

32. For that there is a misjoinder of parties complainant in that complainant seeks to combine a personal claim for damages with a claim of the negro firemen of the class of equitable relief.

33. For that the interest and injuries of the negro firemen do not sufficiently appear to enable the Court to adjudicate their rights in the premises.

[fol. 67] 34. For that an action for damages can not be brought on behalf of a class.

35. For that the decree prayed for by complainant on behalf of the class which he seeks to represent would be unenforceable.

36. For that no reason is alleged why this association can not execute any contract if so desired for the benefit of its members.

37. For that said amended bill fails to allege or to set out in substance or in haec verba the alleged schedule issued March 1, 1929, and Article 26 of said Schedule.

38. For that said amended bill of complaint shows that complainant is seeking to obtain the benefits of an alleged contract between the defendant company and this association as though he were a member of the said brotherhood or association; without the averment that he is a member of said brotherhood or association.

39. For that said amended bill fails to allege what the alleged conspiracy was between the said railroad and this respondent.

40. For that said amended bill does not allege facts sustaining the averment of conspiracy between the railroad and this respondent.

41. For that the allegation of the conspiracy between the railroad and this respondent is a conclusion of the pleader.

42. For that a corporation is incapable of entering into a conspiracy.

43. For that a voluntary association is incapable of entering into a conspiracy.

44. For that it is not alleged that any of the members of this association entered into a conspiracy or that they authorized, ratified or condoned a conspiracy.

45. For aught that appears therefrom, the members of this association had no knowledge and were not parties in any way to the said contracts.

46. For that it is not alleged that the persons whose names appear on the said contract or any of them were

agents, servants of employees of the members of this association, acting within the line, scope and course of their employment as such.

47. For that the allegations that this association was acting as exclusive bargaining agent under the Railway Labor Act of June 21, 1934, is a conclusion of the pleader and no [fol. 68] facts are alleged to support the said concusion.

48. For that the complainant has an adequate remedy at law.

49. For that the said amended bill of complaint shows on its face that if the complainant has suffered wrong, he has an adequate remedy at law against the respondent railroad company by way of damages for breach of contract.

50. For that there are no facts alleged showing that plaintiff will suffer irreparable injury by the wrongs complained of.

51. For that the said amended bill of complaint fails to allege any wrong doing by this association.

52. For that the said amended bill of complaint fails to allege any wrong doing by the members of this association or any of them.

53. For that no facts are alleged which show that this association or any of the members of this association were under any duty to represent the complainants or any of them.

54. For that no facts are alleged to show any duty on any of the members of this association or any breach of any duty by the members of this association.

55. For that it does not appear therefrom that the said agreements or contracts are in any way binding upon any of the complainants or respondents or either of them.

56. For that the remedy of complainants, if the defendant railroad has breached its contract or contracts with them, is at law by way of damages for breach of contract, and for aught appearing from the said amended bill of complaint, said remedy would be entirely adequate.

57. For that no facts are alleged showing any right which equity will protect by injunction.

58. For that it is not alleged therein that the complainant, as a class, was discriminated against by the said contract and it affirmatively appears therein that the classification made by said contract is reasonable.

59. For that the said amended bill fails to allege that the alleged contract between the railroad and this association dated February 18, 1941, is illegal or unlawful in any respect.

[fol. 69] 60. It affirmatively appears therefrom that the said contract complained of by complainants was a contract which this respondent had a perfect right to negotiate, make, execute and put into effect.

61. For that it affirmatively appears therefrom that complainant's remedy, if any, is by and through the administrative agencies set up by the said Railway Labor Act, and that the remedies therein prescribed are adequate.

62. For that it appears affirmatively therefrom that if complainants have any cause of action it is against the individuals who participated in the alleged wrong and not against the members of this association.

63. For that it affirmatiyely appears therefrom that there is no authority or warrant of law for the maintenance of this action against and in the name of this unincorporated organization or association.

64. For that the complainants ask equitable relief without submitting themselves to the jurisdiction of this Court and are not amenable to this Court and are not amenable to the process of this Court.

65. For that the record shows that this Court has no jurisdiction of the members of this association and has no power to render a decree affecting their individual rights.

66. For that it affirmatively appears that this Court has no jurisdiction to render a money decree against any of the members of this association or as against this association as such.

67. For that it affirmatively appears that the decree of this Court would be unenforceable as against the individual members of this association.

68. For that it affirmatively appears that this Court has no jurisdiction over the non-resident members of this association and can not interfere with their freedom of contract.

[fol. 70] 69. For that this Court judicially knows that the members of this association are not liable for the tortuous acts of officers or agents of the association done without the authorization, approval or ratification of the said members.

70. For this Court judicially knows that the officers of this association have no power to bind the individual members of the said association in any way.

71. For that this association is not a proper party respondent to this amended bill of complaint.

72. For that this association is not a legal entity.

73. For that no affirmative relief can be granted against this unincorporated association on this cause of action.

74. For that the said amended bill of complaint is multifarious in that it seeks to combine in the one amended bill of complaint a great number of separate and individual causes of actions by various parties complainants, each standing on separate facts and circumstances and each demanding on its own individual and separate class and degree of relief.

75. For that it affirmatively appears therefrom that the rights of the various parties complainants vary widely in the class and type of relief sought as well as the degree of the relief to which they are entitled and therefore, the said amended bill of complaint is multifarious.

76. For that it *now* shown thereby that the complainants or any of them will suffer irreparable injury by the putting into effect of the alleged contract.

77. For that it affirmatively appears therefrom that there are parties who are not made parties respondent to the amended bill of complaint and whose rights will be injuriously and adversely affected by the decree sought, and who are indispensable parties to this bill of complaint.

78. For that it appears that the white firemen who will be displaced by the relief sought are indispensable parties to this procedure.

[fol. 71] II

And this respondent demurs to that aspect of said amended bill of complaint which prays a perpetual injunction and for grounds of said demurrer sets down and assigns the following:

1. There is no equity in the said aspect of the amended bill of complaint.

2. It affirmatively appears that complainants have an adequate remedy at law.

3. For that the rights which complainants claim therein are not rights which equity will protect by injunction.

4. For that it affirmatively appears that a decree in conformance with the prayer for an injunction would be unenforceable.

5. For that a decree in conformance with the prayer for an injunction would not be enforceable as against the members of this association.

6. For that this Court has no sufficient jurisdiction to render a decree enjoining the members of this association from doing the things and matters complained of therein.

7. For that the granting of the relief prayed for therein as against this respondent would constitute a denial of due processes of law.

8. For that it does not appear therefrom that the members of this association, or any of them, participated in any way in the wrongful acts complained of or that the members of this association or any of them in any way authorized, ratified or approved of such action.

9. For that the same is not a cause of action for or upon which the complainant therein may maintain such action against the members of this organization or association.

10. For that the relief therein prayed, if granted, would not be enforceable as against the members of this association.

11. For that it affirmatively appears therefrom that there are parties who are not made parties respondent to the amended bill of complaint and whose rights will be injuriously and adversely affected by the decree sought, and

who are indispensable parties (to) this amended bill of complaint.

12. For that it appears that the white firemen who will be displaced by the relief sought are indispensable parties to this procedure.

[fol. 72] 13. For that the same amounts to a bill for specific performance.

14. For that under the alleged contract, the breach of which complainant seeks to enjoin, the complainants would not receive anything unique in value, but would receive only money.

III

And this respondent demurs to that aspect of the amended bill of complaint which seeks a discovery, and for grounds of said demurrer sets down and assigns the following:

1. For that the said amended bill of complaint is not sworn to.

2. For that the allegations thereof are not made under oath.

3. For that there is no equity in the said aspect of the amended bill.

4. For that it affirmatively appears therefrom that the complainants have an adequate remedy at law.

5. For that complainants show no right to a discovery.

6. For that the allegations of the said aspect of the bill as amended are so vague, indefinite and uncertain, and the prayer thereof is so vague, indefinite and uncertain that this respondent is not apprised of what it is called upon to defend or what it is called upon to produce in the way of a discovery.

7. For that the said allegations of the said aspect of the amended bill are so vague, indefinite and uncertain that this respondent is not apprised thereby of what information the said complainants are seeking or what information they are entitled to.

8. For that the same is not a cause of action for or upon which the complainant therein may maintain such an action against the members of this organization or association.

9. For that the relief therein prayed, if granted, would not be enforceable as against the members of this association.

10. For that no facts are alleged which show that the members of this association have the information, a discovery of which is prayed.

11. For that there is alleged no duty on the part of the members of this association to give the complainants, or [fol. 73] any of them, a discovery of the information therein sought.

12. For that it does not appear therefrom that the members of this association, or any of them, participated in any way in the wrongful acts complained of or that the members of this association or any of them in any way authorized, ratified or approved of such action.

IV

And this respondent demurs to that aspect of the amended bill of complaint which seeks restoration of plaintiff's and other negro locomotive firemen's rights and recognition of the same apart from the certain alleged agreement, and for grounds of said demurrer sets down and assigns the following:

1. There is no equity in the said aspect of the bill.

2. For that it affirmatively appears that the complainants have an adequate remedy at law.

3. For that it affirmatively appears that complainant's remedy, if any, is at law against the respondent railroad for damages for breach of contract.

4. For that the said relief therein prayed, if granted, would not be enforceable as against this respondent.

5. For that the relief therein prayed for, if granted, would not be enforceable as against the members of this association.

6. For that it affirmatively appears therefrom that the cause of action therein set up is not a cause of action for or upon which the plaintiff therein may maintain such an action against the members of this organization or association.

7. For that it does not appear that the members of this organization or association participated in any way in the wrongful acts complained of therein or that they authorized, ratified or approved the said actions in any way.

8. For that it affirmatively appears therefrom that this respondent can not restore plaintiff's alleged position with the respondent railroad company and any decree rendered against this respondent would be effectual.

[fol. 74] 9. For that it affirmatively appears therefrom that there are parties who are not made parties respondent to the amended bill of complaint and whose rights will be injuriously and adversely affected by the decree sought, and who are indispensable parties to this amended bill of complaint.

10. For that it appears that the white firemen who will be displaced by the relief sought are indispensable parties to this procedure.

11. For that the same seeks specific performance of an alleged obligation for the payment of money.

12. For that the same seeks specific performance of a contract by the alleged terms of which the complainant would receive only money.

13. For that it is not alleged that complainant would receive anything of uniqure (unique) value in the enforcing of the alleged contract.

14. For that the complainants pray for specific performance without offering to perform themselves.

15. For that the performance by either complainants or respondents would be unenforceable.

V

And this respondent demurs to that aspect of the amended bill of complaint which seeks an injunction against this respondent enjoining it and its members and each of them from purporting to act as representatives under the Railway Labor Act for all of the locomotive firemen on the defendant railroad, and for grounds of said demurrer, sets down and assigns the following:

1. There is no equity in the said aspect of the amended bill.

2. For that it affirmatively appears therefrom that the complainants have an adequate remedy at law.

3. For that it affirmatively appears from the allegations thereof that this association has a right under the said Railway Labor Act to act as representative for all the locomotive firemen on the said defendant railroad.

[fol. 75] 4. For that this Court has no power to bind the members of this association by any decree rendered in this cause.

5. For that it affirmatively appears therefrom that this is not a cause of action for or upon which the complainants therein may maintain such a cause of action against the members of this association or organization.

6. For that it affirmatively appears therefrom that there are parties who are not made parties respondent to the amended bill of complaint and whose rights will be injuriously and adversely affected by the decree sought, and who are indispensable parties to this amended bill of complaint.

7. For that it appears that the white firemen who will be displaced by the relief sought are indispensable parties to this procedure.

VI

And this respondent demurs to that aspect of the amended bill of complaint which seeks a declaratory judgment, and for grounds of said demurrer, sets down and assigns the following:

1. There is no equity in the said aspect of the amended bill.

2. For that it affirmatively appears therefrom that the complainants have an adequate remedy at law.

3. For that it affirmatively appears therefrom that there is not a cause of action for or upon which the complainants therein may maintain such an action against the members of this association.

4. For that it affirmatively appears therefrom that there are parties who are not made parties respondent to the amended bill of complaint, and whose rights will be injuriously and adversely affected by the decree sought, and who are indispensable parties to this amended bill of complaint.

5. For that it appears that the white firemen who will be displaced by the relief sought are indispensable parties to this procedure.

6. For that it does not appear therefrom that there is any justiciable controversy between the complainants or any of them and the members of this association.

7. For that it does not appear that there is any justiciable controversy between complainants and this respondent.

[fol. 76] 8. For that it affirmatively appears that an adequate relief and an appropriate remedy are presently available to the complainants through other existing forms of action or proceedings.

VII

And this respondent demurs to that aspect of the amended bill of complaint which seeks damages against this Brotherhood, and for grounds of said demurrer, sets down and assigns the following:

1. For that there is no equity in the said aspect of the amended bill.

2. For that it affirmatively appears therefrom that the complainants have an adequate remedy at law.

3. For that it affirmatively appears therefrom that this is not a cause of action for or upon which the complainants therein may maintain such an action against the members of this association.

4. For that it is not alleged therein that the members of this association participated in any way in, or in any way ratified, confirmed or approved the said action complained of.

5. For that it does not appear therefrom that the said contracts were negotiated or executed by agents, servants, or employees of the members of this association acting within the line and scope of their employment.

6. For that there is no authority or warrant of law for the awarding of damages to a class.

7. For that there is no authority or warrant of law for the awarding of a decree requiring affirmative action on the part of the respondent in favor of a class.

VIII

And this respondent demurs to that aspect of the amended bill of complaint which seeks relief on behalf of the other negro locomotive firemen of the defendant railroad as a class, and for grounds of said demurrer, sets down and assigns the following:

1. For that it appears therefrom that the interests of the negro firemen on the S. and N. A. Seniority Division of the L. and N. Railroad Company are different in kind, class and [fol. 77] degree from the negroes on the other divisions of said railroad.

2. For aught appearing therefrom, many of the parties sought to be made parties complainant will not be injuriously affected by the action complained of.

3. For that it does not appear that any of the parties who are sought to be made parties complainant with the exception of complainant Steele have suffered any injury, damages or invasion of right.

4. For that it does not appear that the contracts of the various parties sought to be made complainants embody the terms of the said Firemen's and Hostlers' Schedule.

5. For that it does not appear therefrom that the various parties complainant have any seniority rights.

6. For that it does not appear therefrom that the various parties complainant are entitled to any seniority rights or privileges or preference of runs.

7. For that it does not appear therefrom that the various parties complainant have any vested property right which has been invaded by the actions complained of.

8. For that there is no equity in the said aspect of the amended bill.

9. For that it affirmatively appears that the complainants have an adequate remedy at law.

10. For that it does not appear therefrom that the complainant has the authority to represent said class.

11. For that it does not appear therefrom that the interests of the class which the complainant seeks to represent are identical with his own.

12. For that it affirmatively appears therefrom that the rights of the various parties sought to be represented by class are widely variant as to the class and type of relief to which they are entitled, if any, and also as to the degree of relief to which they are entitled.

[fol. 78] 13. For that it affirmatively appears therefrom that this is not a cause of action for or upon which the complainants therein may maintain such an action against the members of this association.

14. For that there is no authority or warrant of law for the awarding of damages to a class.

15. For that there is no authority or warrant of law for the awarding of a decree requiring affirmative action on the part of the respondent in favor of a class.

16. For that it affirmatively appears therefrom that there are parties who are not made parties respondent to the amended bill of complaint, and whose rights will be injuriously and adversely affected by the decree sought, and who are indispensable parties to this amended bill of complaint.

17. For that it appears that the white firemen who will be displaced by the relief sought are indispensable parties to this procedure.

Harold C. Heiss, Lange, Simpson, Brantley & Robinson, Solicitors for respondent, Brotherhood of Locomotive Firemen and Enginemen, an unincorporated association.

IN CIRCUIT COURT OF JEFFERSON COUNTY.

MINUTE, ENTRY ON SUBMISSION OF DEMURRERS—April 15, 1942

On this the 15th day of April, 1942 it is ordered by the Court that this cause be submitted for decree on demurrers to amended bill.

IN CIRCUIT COURT OF JEFFERSON COUNTY

AMENDMENT TO AMENDED BILL OF COMPLAINT—Filed June 15, 1942

To the Honorable Judge of Said Court:

Comes the complainant in the above styled case and with leave of the Court first had and obtained, amends the Amended Bill of Complaint as follows:

1. At the end of the first sentence in paragraph 3, insert the following:

"A copy of said Schedule entitled 'Agreement between the Louisville & Nashville Railroad and its Locomotive [fol. 79] Firemen and Hostlers,' issued March 1, 1929, is herewith filed as Exhibit AA to this Amended Complaint, and is prayed to be read in full as a part hereof."

2. At the end of the second sentence in paragraph 5, insert the following:

"Plaintiff does not know the method by which said white firemen designated said Brotherhood as the exclusive bargaining agent and grievance representative under the Railway Labor Act for the entire craft of firemen on the defendant Railroad, has no means of ascertaining and no way of procuring the information since the proceedings of the Brotherhood are secret; but he does aver that in fact the Brotherhood with the knowledge, acquiescence, approval and ratification of said white firemen has been acting as the exclusive bargaining agent and grievance representative as aforesaid."

3. At the end of paragraph 7, insert the following:

"The firemen constituting said 'pool' are constantly changing due to promotions, shifts in assignments, new

jobs, and other factors of railroad operation, but all the white firemen who have been in the 'pool' at any time material herein, or who are now in the 'pool' or who may be eligible for the 'pool' are members of the defendant Brotherhood, take their rights by virtue of its action as exclusive bargaining agent aforesaid, and have expressly made said Brotherhood their representative for all matters affecting contracts, rules, rates and working conditions, and are fully and fairly represented by said Brotherhood in this proceeding."

4. At the end of paragraph 11, insert the following:

"The officers who made and served the notice (Exhibit A), who negotiated and executed said Washington Agreement and Modification thereof (Exhibits B and C) were all, and each, duly authorized by said Brotherhood so to do and were acting in the premises in the course and scope of their employment and for the interest and benefit of the Brotherhood, its members at large, and specifically the white firemen members on the defendant Railroad and in the 'pool' on the S. & N. A. Division. But for the reason that the proceedings of the Brotherhood are secret plaintiff is without knowledge or information or means of obtaining information concerning the details of such authorization, but states that in fact said notice, Agreement and Modification have been approved by all the white firemen on the defend- [fol. 80] ant Railroad and they have claimed all the rights and benefits of the same."

5. At the end of paragraph 19, and paragraph 20 as follows:

"20. Plaintiff at all times on and after April 7, 1941, has been ready, able and willing to perform faithfully and efficiently all duties as a fireman in said 'pool' or elsewhere as his seniority rights have entitled him to, and is still ready, able and willing, has so tendered himself to the defendant Railroad and still tenders himself and will ever tender himself; but he has been prevented wrongfully from exercising his seniority rights and performing his said duties by virtue of the Agreement and Modification aforesaid."

6. At the end of the amended complaint, add the jurat hereto attached: Exhibit "AA" is an agreement between

the Louisville & Nashville Railroad and its Locomotive Firemen and Hostlers, etc., the original of which is included in a supplemental record and sent down along with the original record.

Charles H. Houston, Arthur D. Shores, Attorneys for plaintiff.

Certificate of Service

I, Arthur D. Shores, hereby certify that prior to presenting these proposed amendments to the Court I served a copy of same on counsel for each defendant in open Court.

Arthur D. Shores, Attorney for plaintiff.

Duly sworn to by Bester William Steele. Jurat omitted in printing.

[fol. 81] In Circuit Court of Jefferson County

Amendment to Demurrer of Brotherhood—Filed June 15, 1942

Comes the Respondent, Brotherhood of Locomotive Firemen and Enginemen, and amends its demurrer to the amended bill of complaint as a whole by adding thereto the following grounds, separately and severally:

79. For that the allegation that all the white firemen who have been in the pool at any time material herein or who are now in the pool, or who may be eligible for the pool, are fully and fairly represented by said brotherhood in this proceeding, is a conclusion of the pleader.

80. For that the allegation that said notice, agreement and modification have been approved by all the white firemen on the defendant railroad is not sufficient to charge that said firemen actually participated in the wrongful acts charged or ratified same.

81. For that the approval by any of the white firemen of the acts complained of is not sufficient to impose upon them legal liability.

82. For that it affirmatively appears from the bill of complaint, as last amended, and the exhibits thereto that the rates, rules and working conditions as provided by the

Locomotive Firemen and Hostlers' Schedule was subject to 30 days' written notice by either party.

83. For that it does not appear that complainant's respective contracts of employment have been breached; but it affirmatively appears that the defendant railroad company was within its legal rights in modifying the complainant's respective contracts.

And this respondent amends its demurrer to that aspect of the amended complaint which prays a perpetual injunction by adding thereto the following separate and several grounds:

15. For that said relief, if granted, would amount to a decree of specific performance against the respondents, whereas, specific performance on the part of the complainant could not be enforced.

16. For that there is no authority of law for requiring this respondent to give the complainant and the other negro firemen notice, opportunity to be heard, or a vote on any matter, and a decree in conformity with the prayer of the bill would impose upon this respondent conditions not provided for by the Railway Labor Act.

17. For that this respondent has a right to act as exclusive bargaining agent for the entire craft or class without giving to any individual notice, opportunity to be heard or a vote.

[fol. 82] And as amended, this respondent refiles its demurrers I, II, III, IV, V, VI, VII, VIII to the amended bill of complaint, as last amended, and to the aspects of said amended bill described in said demurrers.

Harold C. Heiss, Lange, Simpson, Brantley & Robinson, Solicitors for respondent, Brotherhood of Locomotive Firemen and Enginemen.

IN CIRCUIT COURT OF JEFFERSON COUNTY

AMENDED DEMURRER OF LOUISVILLE & NASHVILLE RAILROAD COMPANY—FILED JUNE 16, 1942

Comes respondent, Louisville & Nashville Railroad Company and amends its demurrer to the bill of complaint as

last amended, and as separate and several grounds of demurrer adopts all of the grounds of amended demurrer of the Brotherhood of Locomotive Firemen and Enginemen to the bill of complaint as last amended, and this respondent refiles its demurrers numbered 1 to 55, inclusive, to the amended bill of complaint as last amended, and to the aspects of said amended bill described in said demurrers, and adds thereto the following grounds of demurrer:

56. To that aspect of paragraph eleven of the bill as last amended, wherein it is stated that in fact said notice, agreement and modification have been approved by all of the white firemen of the defendant railroad;

(a) For that said language is a mere conclusion of the pleader and is not sufficient to charge any responsible agent of the defendant with ratifying or approving the agre-ment or modification.

(b) For that the allegation "they have claimed all rights and benefits of the same" does not charge this defendant with the ratification or adoption of said agreement to the detriment of complainant.

(c) For that said averment is at most a mere conclusion of the pleader.

[fol. 83] (d) For that said language is not sufficient to charge this respondent with any wrongful act in the premises.

(e) For that said language does not charge this respondent with a violation of any duty or the breach of any agreement with complainant.

(f) For that said language does not charge this respondent with any acts of conspiracy or any wrongful participation in any act or agreement giving rise to a cause of action in favor of the complainant.

Chas. H. Eyster, White E. Gibson, Solicitors for respondent, Louisville and Nashville Railroad Company.

IN CIRCUIT COURT OF JEFFERSON COUNTY

STIPULATION SETTING ASIDE SUBMISSION ON DEMURRERS AND GRANTING LEAVE TO WITHDRAW AMENDED COMPLAINT AND TO SUBSTITUTE ANOTHER AMENDED COMPLAINT—Filed July 17, 1942

To the Honorable C. M. Creel, Chancellor:

The undersigned Solicitors of records for the complainant and respondents respectively in the above styled cause hereby agree as follows:

1. That the submission heretofore made on demurrers to the bill of complaint as amended be set aside.

2. That the Complainant be given leave to withdraw the amended complaint heretofore filed, and be permitted to substitute in the place thereof another amended complaint.

Arthur D. Shores, Solicitor for Complainant. Chas H. Eyster & White E. Gibson, Solicitors for Respondent, L. & N. R. R. J. A. Simpson, Solicitor for B. L. F. & E.

[fol. 84] IN CIRCUIT COURT OF JEFFERSON COUNTY

DECREE SETTING ASIDE SUBMISSION—July 17, 1942

In this cause an agreement was filed by the Solicitors of record for the parties thereto authorizing the Court to set aside the submission heretofore made on demurrers to the bill of complaint as amended, with leave to withdraw the amended complaint heretofore filed and file a substitute therefor, and the Court being of the opinion that the agreement should be confirmed, it is,

Ordered, Adjudged and Decreed by the Court that the submission of the several demurrers to the bill of complaint as amended heretofore taken on the 15th day of June, 1942, be and the same is hereby set aside and complainant is hereby authorized to file a substitute bill in said cause in lieu of the present bill as amended.

Done and Ordered this the 17th day of July, 1942.

E. M. Creel, Circuit Judge, In Equity Sitting.

IN CIRCUIT COURT OF JEFFERSON COUNTY

SUBSTITUTED AMENDED COMPLAINT (FILED BY LEAVE OF COURT FIRST HAD AND OBTAINED)—Filed August 14, 1942

To the Honorable Judge or Judges of said Court:

1. Your Complainant, otherwise known as B. W. Steele, or Will Steele; shows unto your Honor that he is a resident of Jefferson County, Alabama, and over twenty-one years of age; that respondent, Louisville & Nashville Railroad Company (hereafter called the railroad) is a corporation incorporated in the State of Kentucky but engaged in interstate commerce by rail in the State of Alabama; that respondent Brotherhood of Locomotive Firemen & Enginemen (hereafter called the Brotherhood) is an international unincorporated labor union whose membership is principally derived from white locomotive firemen and enginemen employed on interstate railroads, including the defendant railroad. It comprises a Grand Lodge, over 900 subordinate lodges and 89,000 members throughout this country and Canada, including lodges, officers and members resident in Jefferson County, Alabama. It has an international treasury derived from dues paid by members when they are working, and other revenue. By constitution, practice and ritual its membership is restricted to white men, all negro firemen being excluded solely because of race. [fol. 85] Respondent W. H. Thomas is a resident of Jefferson County, Alabama, an engineer fireman employed on defendant railroad, a member of the Brotherhood, and Local Chairman of Brotherhood Local Lodge No. 916, and by-law of the Brotherhood and delegation of its power by the Brotherhood as representative under the Railway Labor Act of June 21, 1934, 48 Stat. 1185, c. 691; 45 U. S. C. A. c. 8, represents the entire craft or class of firemen employed by the railroad on the South and North Alabama Division with regard to adjustment of seniority rights and job assignments (See Arts. 25 and 26, Exhibit I below). Respondent J. P. Adams is a resident of Montgomery County, Alabama, an engineer-fireman employed on said railroad, a member of the Brotherhood, and Local Chairman of Brotherhood Local Lodge No. 864, and by-by-law of the Brotherhood and delegation of its power by the Brotherhood as representative under the Railway Labor Act, represents the entire

craft or class of firemen employed by the railroad on the Montgomery and Mobile Division with regard to adjustment of seniority rights and jobs assignments, as above stated. Respondent B. F. McGill is a resident of Mobile County, Alabama, an engineer fireman employed on said railroad, a member of the Brotherhood and Local Chairman of Brotherhood Local Lodge No. 689, and by by-law of the Brotherhood and delegation of its power by the Brotherhood as representative under the Railway Labor Act, represents the entire craft or class of firemen employed by the railroad on the Mobile and New Orleans Division with regard to adjustment of seniority rights and job assignments, as above stated.

2. Complainant is a negro fireman employed by the railroad on its South and North Alabama Division. He brings this suit (1) in his individual capacity for wrongs inflicted on his individual rights, and (2) as representative of all the negro firemen and helpers on other than steam power (hereafter compendiously called firemen) employed by respondent railroad, particularly those employed on the four seniority districts known respectively as the South and North Alabama Division above, the Montgomery and Mobile Division above, the Mobile and New Orleans Division above, and the Pensacola Division. Said negro firemen constitute over a hundred men resident in several states, a class too large to be brought individually before this Court; but there are common questions of law and fact affecting their [fol. 86] several rights, common grievances growing out of common wrongs, and common relief is sought for the entire class as well as special relief for this complainant. The interests of the class are fairly and adequately represented by complainant.

3. Respondent railroad is sued on its own right. Respondent Brotherhood is sued in its own right and as representative of all its individual members, specifically those employed by respondent railroad and particularly those employed on the four seniority districts above named. Respondents W. H. Thomas, J. P. Adams and B. F. McGill are sued as members of the Brotherhood and as representatives of all the Brotherhood members, specifically those employed by respondent railroad and particularly those employed on the four seniority districts above named. The

Local Chairman of the Pensacola Division is a non-resident of the State of Alabama. The Brotherhood-member fireman on the four seniority districts above named constitute several hundred men resident in several states, and the Brotherhood-member firemen on the entire system of respondent railroad are even larger in number. They constitute a class too numerous to be brought individually before this Court; but there are common questions of law and fact affecting their several interests, and all their alleged rights and claims in the premises are directly derived from and wholly dependent upon the acts of the respondent, Brotherhood as their representative under the Railway Labor Act, and common relief is sought against them as a class, as well as special relief against those individuals wrongfully holding jobs which negro firemen are entitled to under their contracts with the railroad and which they would be holding except for the acts of the railroad and the Brotherhood under color of the Agreement and Modification thereof hereinbelow set out as Exhibits III and IV.

The individual Brotherhood-member firemen wrongfully holding said jobs are constantly changing due to promotions, transfers and other causes, but the interests of the Brotherhood-member firemen employed on respondent railroad in the premises are fairly and adequately represented by the Brotherhood itself without more, as well as by the individual respondents.

[fol. 87] 4. Complainant is 55 years of age, in perfect health, with no physical defects or infirmities affecting his capacity as a fireman. He has been employed by the respondent railroad as a locomotive fireman since February 4, 1910, and has worked as such on the South and North Alabama Division since March 5, 1910, with seniority rights (Exhibit I below) from the latter date. He worked as a fireman in road passenger service on said Division from December 28, 1921, to April 8, 1941, when he was displaced by the wrongs of the railroad and the Brotherhood as set out below. In all respects he has at all times performed his duties as a locomotive fireman loyally and efficiently to the best interest and complete satisfaction of the railroad. He has not had a demerit, complaint or been subject to disciplinary action within the past sixteen years. At all times when he was wrongfully displaced he tendered himself to both the railroad and the Brotherhood as ready,

able and willing—and was in fact ready, able and willing—to serve on the jobs he was entitled to under his contract with the railroad.

5. Complainant was originally employed by the railroad and is still working for it under an individual contract of hiring between himself and the railroad. His contract has been modified from time to time by mutual agreement between plaintiff and the railroad, and presently embodies the terms of the collective bargaining "*Agreement between the Louisville & Nashville Railroad and Its Locomotive Firemen and Hostlers*" issued March 1, 1929, and incorporated in full herewith as Exhibit I attached hereto (and previously referred to herein).

6. The other negro firemen employed by the railroad are working under their respective individual contracts of hiring between them and the railroad. Their present contracts embody the terms of Exhibit I.

7. The negro firemen constitute a minority of the total number of firemen employed by respondent railroad, but constitute a majority of the firemen employed on each of the four seniority districts listed above. The Brotherhood-member firemen constitute the majority of the total number of firemen employed on the entire system of respondent railroad, but constitute the minority of the firemen on the said four seniority districts. The negro firemen and the [fol. 88] Brotherhood-member firemen together comprise the entire craft or class of firemen employed on respondent railroad.

8. By virtue of the fact they constitute the majority of the firemen on the entire system, the Brotherhood-member firemen ever since the passage of said Railway Labor Act have chosen the Brotherhood as the representative under said Act of the entire craft or class of firemen employed by respondent railroad. Complainant does not know, and because the proceedings of the Brotherhood are secret, cannot ascertain or state the method of selection, but avers that the Brotherhood with the knowledge of its said members has claimed the exclusive right to act and has acted as the exclusive bargaining agent and grievance representative of the entire craft or class aforesaid, and further avers that said Brotherhood members have individually and collectively claimed the benefits of all actions by the Brotherhood

as representative under the Railway Labor Act of the entire craft or class of firemen in the premises.

9. Neither complainant nor any of the other negro firemen has ever been given an opportunity to nominate or participate in the choosing of a representative of the entire craft or class under the Railway Labor Act; but by virtue of their minority position they have been compelled to accept the Brotherhood as choice of the majority for their statutory representative under the Railway Labor Act for the purposes of the Act. They did so accept the Brotherhood as the representative under the Railway Labor Act of the entire craft or class of firemen, including themselves, and assuming that the Brotherhood would exercise its powers under the Railway Labor Act without fraud or discrimination against them they relied on it for protection of their rights in collective bargaining and handling of grievances with respondent railroad.

10. Negroes are not employed on railroads as locomotive firemen except in the South. The bulk of such employment is on the railroads listed in Exhibits II and III below. On each individual railroad so listed the negro firemen constitute the minority of the craft or class on the entire system, although they constitute the majority on certain seniority districts. On each individual railroad so listed the Brotherhood-member firemen constitute the majority of the craft or class on the entire system, although they constitute the minority on certain seniority districts. On each said railroad the Brotherhood-member firemen ever since [fol. 89] the passage of the Railway Labor Act aforesaid have chosen the Brotherhood as the representative under the Act of the entire craft or class, but for reasons stated above complainant can not state the method used.

11. By accepting the designation as representative of the entire craft or class of firemen employed by respondent railroad under the Railway Labor Act, and by asserting the exclusive right under the Railway Labor Act to represent said craft or class in collective bargaining and handling of grievances, the Brotherhood placed itself in a confidential relation with each fireman and undertook a fiduciary duty to represent him impartially, in good faith; to give him reasonable notice, opportunity to be heard and a chance to vote on any action proposed by it as his statutory representa-

tive adverse to his interest: to make prompt and full disclosure of all actions taken by it affecting his interests in any way; not to discriminate against a non-member in favor of itself and its members: and generally to conform to and respect the rules of law and standards of conduct governing the relations of principal and agent, as the statutory representative of the entire craft or class of firemen under the Railway Labor Act. Nevertheless in violation of its duty the Brotherhood has persistently been and is now hostile and disloyal to complainant and the minority non-member negro firemen, has persistently sought and still seeks to destroy their *desired* seniority rights and to drive them out of employment of the railroad in order to create a monopoly of employment, or failing that the most favored conditions of employment regardless of seniority, competence or worth, for its own members. It has always refused and still refuses to notify complainant or the other negro firemen of proposed actions adversely affecting their interests, to give them a chance to be heard or vote on the same; has always refused and still refuses to report to them its actions as their statutory representative under the Railway Labor Act or to handle their just grievances wherever there is a conflict of interest between them and Brotherhood members, has persistently refused and still refuses to give them fair, honest and faithful representation under the Railway Labor Act.

[fol. 90] 12. On or about March 28, 1940, in fraud of the rights of complainant and the other negro fireman employed by the railroads listed in Exhibits II and III below, and without notice or opportunity to be heard or to vote on the matter being given them, the Brotherhood (by and thru its General Chairman on each said railroad, including respondent railroad, thereunto duly and expressly authorized and acting within the line and scope of his employment) purporting to act under the Railway Labor Act on behalf of the entire craft or class of firemen, did serve on each said railroad a Notice to amend existing collective bargaining agreements covering the standard provisions in the individual hiring contracts of the individual firemen on each railroad, aimed at driving the negro firemen completely out of the service of said railroads to the profit of itself and its own members, regardless of seniority, competence or worth. A

copy of said Notice is hereto attached as Exhibit II and incorporated in full herewith.

13. According to existing railroad practice in the United States locomotive engineers are obtained by promotion of selected white locomotive firemen. By traditional and universal railroad practice in the United States negro firemen arbitrarily are never promoted to engineers, regardless of knowledge, experience, competence and worth. To distinguish the white firemen as a class from the negro firemen as a class, the white firemen are known under standard railroad practice as "promotable men", while the negro firemen are known as "non-promotable men"; and the phrases "promotable men" and "promotable firemen or helpers" used in said Notice (Exhibit II above) mean white firemen and helpers in contrast to negro firemen and helpers.

14. At all times the general officers of respondent railroad, specifically—the Director of Personnel and his staff who by by-law and usage of the railroad have charge of all conditions of work among employees, have known that the Brotherhood has always been hostile to Complainant and the minority negro firemen, that it has persistently sought to destroy their vested seniority rights and drive them out of service in order to create a monopoly of employment, or failing that the most favored conditions of employment regardless of seniority, competence or worth for its own members; and said officials well knew that the Notice (Exhibit II above) served was in execution of the fraudulent disloyal purposes of the Brotherhood aforesaid.

[fol. 91] 15. By virtue of the contracts which it had entered into with complainant and the other negro firemen the railroad was under a duty to them to give preference of runs to the oldest fireman in road service when competent and worthy. Yet well knowing the hostility and motives of the Brotherhood toward complainant and the other negro firemen, that the objects aimed at in said Notice were opposed to preferences based on seniority, competence and worth; that the purpose of the Notice was to cause the railroad to breach its contracts with the negro firemen, and to curtail their seniority rights and destroy their employment in order to create a monopoly of employment for the Brotherhood-member firemen, the

railroad did violate its duty to plaintiff and the other negro firemen to give preference of runs to the oldest fireman in road service when competent and worthy, and did enter into an Agreement dated February 18, 1941, effective February 22, 1941 (the text of which, with signatures of defendant railroad's general offices omitted, is attached hereto as Exhibit III and incorporated in full herewith), discriminating against the complainant and other negro firemen in favor of the Brotherhood-member firemen who constituted the entire class of men designated in said Agreement as the "promotable firemen and helpers". In negotiating and executing said Agreement the respective officers of the Brotherhood and the railroad severally and collectively acted within the line and scope of their employment as such.

16. Thereafter on May 12, 1941, the railroad by and thru its Director of Personnel then and there acting within the line and scope of his employment, and the Brotherhood by and thru its General Chairman on the respondent railroad then and there acting within the line and scope of his employment, made a modification of said Agreement (Exhibit III above) further curtailing complainant's and the other negro firemen's seniority rights and restricting their employment, to the unfair advantage of the Brotherhood member-firemen, the "promotable firemen and helpers." A copy of said modification is hereto attached as Exhibit IV and incorporated in full herewith. In negotiating and executing said modification (Exhibit IV) the Brotherhood purported to act as the representative under the Railway Labor Act of the entire craft or class of firemen on respondent railroad, without notice, opportunity to be heard or a chance to vote on the same.

[fol. 92] 17. The Brotherhood never reported to complainant or any other negro firemen that it had negotiated and executed either the Agreement (Exhibit III) or modification (Exhibit IV), but complainant and the negro firemen were forced to obtain their knowledge of the same from other sources.

18. In negotiating and executing said Agreement and modification the railroad, acting by and thru its general officers who were then and there acting within the line and scope of their employment, did conspire and confederate

with the Brotherhood to curtail the seniority rights and job assignments of complainant and the negro firemen in breach of existing contracts with the negro firemen, to the fraudulent advantage of the Brotherhood-member firemen. In further execution of said conspiracy the railroad and the Brotherhood did put said Agreement and modification into effect as the controlling operative policy on the entire railroad system, particularly the four seniority districts above named, without any notice to complainant or the other negro firemen, or without giving them a hearing or opportunity to protest the same.

19. As the controlling operative policy on respondent railroad system practically every time a vacancy occurred on the four seniority divisions or a new run or job was created on the same, the Brotherhood and the railroad in further execution of said conspiracy arbitrarily disqualified complainant and the other negro firemen regardless of seniority, competence and worth, and assigned said vacancies and new jobs and runs to Brotherhood-member firemen junior in seniority to the negro firemen, without regard to competence or worth under color of said Agreement and modification. As a result of said wrongful acts the employment of negro firemen on said four seniority districts was severely curtailed to the corresponding wrongful increase in the employment of Brotherhood-member firemen; the Brotherhood itself was unjustly enriched by virtue of increased dues paid by Brotherhood-member firemen as a result of their increased employment (Brotherhood-member firemen do not pay dues when furloughed).

[fol. 93] 20. Prior to the passage of the Railway Labor Act aforesaid and down to April 8, 1941, complainant by virtue of his seniority, competence and worth was a fireman in road passenger service assigned to the South-End Passenger Pool, running between Birmingham and Montgomery, rotating first-in first-out, handling certain specified regular passenger trains. Assignments to the South-End Passenger Pool constitutes one of the most favored jobs in rates of pay and working conditions available to firemen in the South and North Alabama Division. Complainant's monthly earnings, after deduction of $7.65 insurance, $2.60 hospital fund and $3.00 per $100.00 earned for retirement, averaged while in the Pool about $225.00. His

longest run did not exceed 3½ hours; he did not have to clean fires, received his engine at the passenger station starting the trip and was relieved at the passenger station on the end of the trip.

21. On or about April 1, 1941, the jobs in said South-End Passenger Pool were bulletined for bidding-in because the number of firemen in the Pool had to be reduced after April 7, 1941, due to reduction in mileage. On April 1, 1941, the firemen in the Pool with respective seniority dates were as follows:

Bester William Steele, colored	March 5, 1910
Henry Russell, colored	June 25, 1917
M. E. Bowen, white	August 20, 1917
Arthur Willingham, colored	November 13, 1919
John Harris, colored	March 23, 1920
John Wooley (swing man) colored	December 17, 1922

The negro firemen were rendering satisfactory service in the Pool, no complaints had been made against them and they were competent, worthy and entitled to remain in the Pool by virtue of their seniority, competence and worth (subject to the rights of M. E. Bowen who was senior to Willingham, Harris and Wolley). Yet the railroad and the Brotherhood in further execution of said conspiracy did arbitrarily disqualify all the negro firemen from bidding in any Pool job under color of said Agreement and modification, and did assign the Pool jobs to Brotherhood-member firemen whose seniority dates were as follows: [fol. 94]

M. E. Bowen, Brotherhood-member	August 20, 1917
B. W. Morgan, Brotherhood-member	April 4, 1925
C. B. Nance, Brotherhood-member	February 25, 1940
Raymond B. Matthews, Brotherhood-member	March 8, 1940

Said Brotherhood-member firemen were not more competent or worthy than complainant or the other negro firemen, but were given the Pool jobs solely by force of said Agreement and modification because they were Brotherhood members, belonging to the class designated in the Notice, Agreement and modification aforesaid as "promotable firemen and helpers" in contrast to the negro firemen, the "non-promotables."

22. As a result of being illegally and fraudulently barred from bidding-in a Pool job as he was entitled to and to hold by virtue of his seniority, competence and worth, complainant was thrown completely out of work from April 8, 1941 to April 24, 1941. On April 25, 1941, he obtained a job firing an engine for a local freight run which meant an average of twelve hours on a run, going 5 miles *further* to get his engine and to be relieved, harder work on the engine to keep up steam because freight engines burn an inferior grade of coal compared to that burned in passenger service, and more arduous labor throughout the run; further his health was impaired because of the longer hours without hot food and by increased constipation because he was deprived of comfort facilities for longer periods; and his average earnings were reduced about $75.00 per month. Further his rights under the Railway Pension Act of June 24, 1937, 50 Stat. 310, c. 382, 45 U. S. C. A. c. 9, were impaired, and his potential retirement annuity diminished by his loss of earnings aforesaid.

23. Thereafter on or about December 22, 1941, the railroad and the Brotherhood in further execution of said conspiracy under color of said agreement and modification did arbitrarily and wrongfully displace complainant on said local freight run by a Brotherhood-member fireman junior in seniority to him, although no complaint had been made about his work and he was in every respect as competent and worthy as the Brotherhood member who displaced him, and was in fact wholly competent and worthy to hold said local freight run and was holding it to the satisfaction of the railroad. As a result complainant had to take a job of firing a switch engine by hand, which was even more [fol. 95] arduous than the local freight service above. He was forced to serve longer hours, work more days per month, yet received less money than either on the local freight run or in the Pool service. By virtue of said conspiracy the railroad and the Brotherhood wrongfully kept complainant on the switch engine until January 3, 1942, when he was reassigned to the South-end Passenger Pool. Complainant avers that by seniority, competence and worth he was entitled to have remained in the Pool at all times and never to have been removed therefrom.

23. Complainant and the negro firemen have exhausted their remedies within the structure of the railroad and the

Brotherhood. They protested as soon as they discovered said Agreement and modification both to the railroad and the Brotherhood, to no avail. They appealed their protests to the highest operating officer of the railroad with jurisdiction in the premises and to the general officers of the Brotherhood, including its General Chairman on respondent railroad; yet all the railroad officers and all the Brotherhood officers acting within the line and scope of their several employments have reaffirmed on behalf of the railroad and the Brotherhood both the Agreement and modification, and expressed their intentions to enforce same now and in the future; and unless restrained by this Court the seniority rights and job assignments of complainant and the negro firemen will be continuously threatened and curtailed by defendants railroad and Brotherhood acting in conspiracy under color of said Agreement and modification, and they will be deprived of fair, honest and impartial representation by the Brotherhood as the representative of the entire craft or class of firemen under said Railway Labor Act.

24. Complainant and the other negro firemen to ascertain part of their damages must know the names, time worked and amounts earned by every Brotherhood-member fireman junior in seniority to them, on every job on respondent railroad from which negro firemen were displaced by the railroad and the Brotherhood under color of the aforesaid Agreement and modification. Neither complainant nor any of the negro firemen has this information, nor does he have any source from which to obtain same except thru the railroad and the Brotherhood. Both the railroad and the Brotherhood have this information readily available, same is material to the issues in this suit, and complainant is [fol. 96] entitled to have same discovered and made known by them.

25. Complainant and the other negro firemen to establish the conspiracy and the discriminations against them by the railroad and the Brotherhood must know how the Brotherhood arrived at its decision to serve the Notice (Exhibit II above), all contacts it had with the railroad concerning the same, all steps in the negotiations leading up to the Agreement (Exhibit III) and modification (Exhibit IV), and all proposals by either to the other in enforcement of said Agreement and modification, and action taken on said

proposals. Further they must know all proposals by either the railroad or the Brotherhood to the other, and all actions taken on said proposals (wherever the proposal and action have not already been communicated to complainant and the negro firemen) aimed at or like- to result in curtailing their seniority rights or restricting their employment in any way in favor of the Brotherhood-member firemen. Neither complainant nor any other negro fireman has any of this information, nor does he have any source from which to obtain same except thru the railroad and the Brotherhood. Both the railroad and the Brotherhood have all this information readily available; same is material, even indispensable, to the issues in this suit, and complainant is entitled to have same discovered and made known by them. As to the Brotherhood complainant avers that by virtue of the confidential relationship between the individual negro firemen and the Brotherhood, and the fiduciary duty which the Brotherhood owes each of them as representative of the entire craft or class of firemen under the Railway Labor Act, the Brotherhood is under the affirmative duty of making the discovery called for.

26. An actual claim or controversy exists between complainant and the negro firemen as a class on one side, and the railroad, the Brotherhood and the Brotherhood-member firemen on the other as to the duties of the Brotherhood toward the negro firemen as representative of the entire craft or class of firemen under the Railway Labor Act; and as to the lawful force and effect, if any, of the Agreement and modification aforesaid. The interests on each side are adverse, and unless this Court will declare the rights, duties, interests and legal relations of the parties, numerous vexatious disputes will arise between the parties, and the complainant and the negro firemen will suffer irreparable injury to their seniority rights, and their [fol. 97] retirement rights under the Railroad Retirement Act.

27. The Railway Labor Act, particularly Section 2-Fourth (45 U. S. C. A. Sec. 152-Fourth), so far as it attempts to confer on the majority of a craft or class of railway employees the power to choose the representative for the entire craft or class, and to confer on said representative unbridled and absolute power to destroy minority property

rights in favor of the majority, is void as violating the due process clause of the Fifth Amendment to the Constitution of the United States.

Wherefore, Premises Considered: Your Complainant prays that W. H. Thomas, 4301 Pulaski Street, Inglenook, Birmingham, Alabama; J. P. Adams, 1034 Forest Avenue, Montgomery, Alabama; and B. F. McGill, 261 Rapier Avenue, Mobile, Alabama, respondents, be made parties to these proceedings by proper process; that they be required to plead, answer or demur thereto within the time prescribed by law, and that the other respondents being already before this Court by process lawfully served upon them, be required to plead, answer or demur thereto within the time prescribed by law; and further pray that:

1. He be granted a permanent injunction against each respondent and the persons they severally represent enjoining them and each of them from enforcing, making any claims under, or otherwise recognizing said Agreement and modification thereof.

2. Discovery by the railroad and the Brotherhood of the names, time worked and amounts earned by every Brotherhood member fireman junior in seniority to any negro fireman displaced by such Brotherhood-member fireman under color of said agreement and modification.

3. Discovery by the railroad and the Brotherhood, as they may respectively have the information available, of the process by which the Brotherhood arrived at its decision to serve the Notice (Exhibit II), all contacts between the railroad and the Brotherhood concerning the same, all steps in the negotiations leading up to the Agreement (Exhibit III) and modification (Exhibit IV), and all proposals by either to the other in enforcement of said Agreement and modification, and action taken on said proposals; and further all proposals by either railroad or Brotherhood to the other and all actions taken on said proposals (wherever the proposal and action have not already been communicated to complainant and the negro firemen) aimed at or like to result in curtailing their seniority rights or restricting their [fol. 98] employment in any way in favor of the Brotherhood-member firemen.

4. A permanent injunction against respondent Brotherhood, its officers, subordinate lodges, members, agents, or

attorneys, and the individual defendants perpetually enjoining them and each of them from purporting to act as representative of complainant or the other negro firemen on respondent railroad, under the Railroad Labor Act, so long as it or any of them refuses to give them notice, and an opportunity to be heard and to vote on proposals adversely affecting their interests, to make prompt and full disclosure of all actions taken by it or any of them affecting their interests in any way, and so long as it discriminated against any of them in favor of itself or any Brotherhood-member fireman.

5. A decree binding all parties and their privies and those represented herein, settling and declaring the respective rights, status, and other legal relations of the parties in, to and by reason of the matters here in controversy.

6. Damages against the Brotherhood for injuries sustained by plaintiff as a proximate consequence of the wrongful actions of the Brotherhood in breach of its confidential relation with and fiduciary duties toward plaintiff, in the sum of Fifty Thousand ($50,000.00) Dollars.

7. Damages against the Brotherhood for injuries sustained by the individual negro firemen as a proximate consequence of the wrongful actions of the Brotherhood in breach of its confidential relation with and fiduciary duties toward the said individual negro firemen, so far as said individual firemen may appear before this Court, submit to the jurisdiction thereof, and establish their damages in the premises by legal evidence.

8. General Relief.

Arthur D. Shores, 1630 4th Ave., N. Birmingham; J. T. Settle, 145 Beale Avenue, Memphis, Tenn.; Charles H. Houston, 615 F St. N. W. Wash., D. C.; J. C. Waddy, 615 F St., N. W. Wash., D. C. Attorneys for complainant.

[fol. 99] *Duly sworn to by Bester William Steele. Jurat omitted in printing.*

[fols. 100-101] CERTIFICATE OF SERVICE

I, Arthur D. Shores, do hereby certify that prior to filing this Substituted Amended Complaint I served a copy on Lange, Simpson, Brantley & Robinson, Esquires, Attorneys for the respondent Brotherhood, Nelson Building, Birmingham, Alabama, and on Gibson & Gibson, Esquires, White Gibson, Esquire, Chas. H. Eyster, Esquire, Attorneys for the respondent railroad, Comer Building, Birmingham, Alabama.

Arthur D. Shores.

August 14, 1942.

NOTE RE EXHIBIT I TO SUBSTITUTED AMENDED COMPLAINT

Exhibit One is a book entitled "Agreement between the Louisville and Nashville Railroad and its Locomotive Firemen and Hostlers, etc."

This book contains eighty-five pages, setting out in detail the rules, regulations, Mediation agreement, Arbitration Award, Supplementary agreement, rates and tables. The Original Exhibit will be sent to the Supreme Court for its inspection, along with the Court record.

EXHIBIT II TO SUBSTITUTED AMENDED COMPLAINT—Omitted. Printed side page 61 ante

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[fols. 102-112] EXHIBIT III TO SUBSTITUTED AMENDED COMPLAINT—Omitted. Printed side page 13 ante

EXHIBIT IV TO SUBSTITUTED AMENDED COMPLAINT OMITTED. Printed side page 16 ante

[fol. 113] IN CIRCUIT COURT OF JEFFERSON COUNTY

DEMURRER OF L. & N. R. R. CO. TO COMPLAINT—Filed August 26, 1942

Comes defendant in above cause and by leave of Court refiles all demurrers heretofore filed to complainant's complaint as separate and several grounds of demurrer to complainant's complaint as last amended.

Chas. H. Eyster, and White E. Gibson, Solicitors for L. & N. R. R. Co.

[fol. 114] IN CIRCUIT COURT OF JEFFERSON COUNTY

DEMURRER OF BROTHERHOOD TO THE SUBSTITUTED AMENDED BILL—Filed September 16, 1942

I

Comes the Brotherhood of Locomotive Firemen and Enginemen, one of the respondents in the above cause, and demurs to the substituted amended bill of complaint in this cause presented against it as a whole, and as grounds of said demurrer, sets down and assigns the following, separately and severally:

1. For that it does not appear therefrom that the individuals who negotiated the alleged contracts attached as exhibits to said substituted amended bill of complaint were agents, servants or employees of the members of this association generally, and were acting in the line and scope of their employment as such.

2. For that it does not appear therefrom with sufficient certainty that the individuals who negotiated and executed the alleged contracts were, at the time, acting within the line and scope of their authority as agents, servants, or employees of this association.

3. For that it does not appear therefrom with sufficient certainty that the individuals who negotiated and executed said contracts were, at the time, acting as agents, servants or employees of the members of this association within the line and scope of their authority as such.

4. For that there does not appear therefrom any reason why this association or the members thereof should be held accountable for the actions of the statutory representatives under the Railway Labor Act.

5. For that the allegation that complainant's contract embodied the standard provisions of the Firemen's and Hostlers' Schedule issued March 1, 1929, is a conclusion of the pleader.

6. For that the allegation that the complainant's employment status is a vested property right is a conclusion of the pleader.

7. For that the allegation that the white members of the Brotherhood have designated said Brotherhood as the ex-

clusive bargaining agent and grievance representative for the entire craft or class of firemen on defendant railroad is a conclusion of the pleader.

[fol. 115] 8. For that the averments thereof are so vague, indefinite and uncertain that this respondent is not sufficiently apprised as to what actions on its part are complained of by the various parties complainant.

9. For that it does not appear with sufficient certainty who was the designated bargaining agent for the entire craft or class under the Railway Labor Act.

10. For that it does not appear that this association has ever been certified as the exclusive bargaining agent under the Railway Labor Act.

11. There is no equity in the amended bill.

12. It affirmatively appears therefrom that this action is not maintainable against the members of this association generally.

13. For that it does not appear therefrom that this cause of action is a cause of action for or upon which the complainant therein may maintain such an action against the members of this organization or association.

14. For that it affirmatively appears therefrom that this is not a cause of action for or upon which the complainant therein may maintain such an action against the members of this organization or association.

15. For that the substituted amended bill of complaint does not allege that the persons whose names appear on Exhibits 1 and 2 of the original bill of complaint as signing on behalf of the Brotherhood of Locomotive Firemen and Enginemen and Brotherhood of Locomotive Firemen and Enginemen Committee were authorized by the members of this association to execute the said document or that the execution of said document was ratified by the members of this association.

16. For that it affirmatively appears therefrom that the execution of the document constituting Exhibits 1 and 2 of said substituted amended bill of complaint were neither authorized nor ratified by the members of this association.

17. For that it does not appear therefrom that the documents constituting Exhibits 1 and 2 of the said substituted amended bill of complaint were executed for or on behalf of the members of this association.

[fol. 116] 18. For that it affirmatively appears therefrom that the documents constituting Exhibits 1 and 2 of said substituted amended bill of complaint were not executed for or on behalf of the members of this association.

19. For that the allegation that complainant is employed by the defendant, Louisville & Nashville Railroad Company, on the S. & N. A. Division, with seniority rights as a firemen is a conclusion of the pleader.

20. For that the averments of the substituted amended bill are not definite and certain enough to apprise this respondent what it is called upon to defend.

21. For that there are no facts alleged which show that complainant was entitled to seniority rights, nor is there any averment as to what seniority rights plaintiff was entitled.

22. For that it does not appear therefrom by what right plaintiff brings suit as a class suit on behalf of the other negro locomotive firemen on the defendant's railroad.

23. For that it affirmatively appears therefrom that the complainant has no right to maintain this substituted amended bill on behalf of the other negro firemen.

24. For that it appears therefrom that the measure and extent of complainant's damages as well as the class of complainant's damages is materially different from that of others constituting the class which he seeks to represent.

25. For that it does not appear therefrom that the complainant has the consent or authority of the class which he seeks to represent.

26. For that it does not appear therefrom that the other members of the class which complainant seeks to represent have seniority rights or that their rights have been affected in any way by the action complained of.

27. For that the said substituted amended bill of complaint shows that said complainant is asking the benefits of the alleged contracts between the railroad and the locomotive firemen and hostler's schedules issued on March

1, 1929, and is unwilling to abide by the terms, provisions and conditions of the said alleged schedule or contract.

[fol. 117] 28. For that it does not appear therefrom that complainant, or any of the class which he seeks to represent, have sustained any injuries or damages as a result of the action complained of.

29. For that there are not alleged therein any facts which make the alleged contract constituting Exhibits 1 and 2 of said substituted amended bill of complaint illegal, unconscionable or unfair.

30. For that it affirmatively appears therefrom that both parties respondent were free contracting agencies and had right to make and enter into the contracts set out as Exhibits to the substituted amended bill.

31. For that the relief prayed for in the substituted amended bill would be an undue interference with the rights of the parties respondent to contract as they have a right to do.

32. For that there is a misjoinder of parties complainant in that complainant seeks to combine a personal claim for damages with a claim of the negro firemen of the class for equitable relief.

33. For that the interest and injuries of the negro firemen do not sufficiently appear to enable the Court to adjudicate their rights in the premises.

34. For that an action for damages cannot be brought on behalf of a class.

35. For that the decree prayed for by complainant on behalf of the class which he seeks to represent would be unenforceable.

36. For that no reason is alleged why this association can not execute any contract if so desired for the benefit of its members.

37. For that said substituted amended bill fails to allege or to set out in substance or in haec verba the alleged schedule issued March 1, 1929, and Article 26 of said Schedule.

38. For that said substituted amended bill of complaint shows that complainant is seeking to obtain the benefits

of an alleged contract between the defendant company and this association as though he were a member of the said brotherhood or association, without the averment that he is a member of said brotherhood or association.

[fol. 118] 39. For that said substituted amended bill fails to allege what the alleged conspiracy was between the said railroad and this respondent.

40. For that said substituted amended bill does not allege facts sustaining the averment of conspiracy between the railroad and this respondent.

41. For that the allegation of the conspiracy between the railroad and this respondent is a conclusion of the pleader.

42. For that a corporation is incapable of entering into a conspiracy.

43. For that a voluntary association is incapable of entering into conspiracy.

44. For that it is not alleged that any of the members of this association entered into a conspiracy or that they authorized, ratified or condoned a conspiracy.

45. For aught that appears therefrom, the members of this association had no knowledge and were not parties in any way to the said contracts.

46. For that it is not alleged that the persons whose names appear on the said contract or any of them were agents, servants or employees of the members of this association, acting within the line, scope and course of their employment as such.

47. For that the allegations that this association was acting as exclusive bargaining agent under the Railway Labor Act of June 21, 1934, is a conclusion of the pleader and no facts are alleged to support the said conclusion.

48. For that the complainant has an adequate remedy at law.

49. For that the said substituted amended bill of complaint shows on its face that if the complainant has suffered wrong, he has an adequate remedy at law against the respondent railroad company by way of damages for breach of contract.

50. For that there are no facts alleged showing that plaintiff will suffer irreparable injury by the wrongs complained of.

[fol. 119] 51. For that the said substituted amended bill of complaint fails to allege any wrong doing by this association.

52. For that the said substituted amended bill of complaint fails to allege any wrong doing by the members of this association or any of them.

53. For that no facts are alleged which show that this association or any of the members of this association were under any duty to represent the complainant or any of them.

54. For that no facts are alleged to show any duty on any of the members of this association or any breach of any duty by the members of this association.

55. For that it does not appear therefrom that the said agreements or contracts are in any way binding upon any of the complainants or respondents or either of them.

56. For that the remedy of complainants, if the defendant railroad has breached its contract or contracts with them, is at law by way of damages for breach of contract, and for aught appearing from the said substituted amended bill of complaint, said remedy would be entirely adequate.

57. For that no facts are alleged showing any right which equity will protect by injunction.

58. For that it is not alleged therein that the complainant, as a class, was discriminated against by the said contract and it affirmatively appears therein that the classification made by said contract is reasonable.

59. For that the said substituted amended bill fails to allege that the alleged contract between the railroad and this association dated February 18, 1941, is illegal or unlawful in any respect.

60. It affirmatively appears therefrom that the said contract complained of by complainants was a contract which this respondent had a perfect right to negotiate, make, execute and put into effect.

61. For that it affirmatively appears therefrom that complainant's remedy, if any, is by and through the adminis-

trative agencies set up by the said Railway Labor Act and that the remedies therein prescribed are adequate.

[fol. 120] 62. For that it appears affirmatively therefrom that if complainants have any cause of action it is against the individuals who participated in the alleged wrong and not against the members of this association.

63. For that it affirmatively appears therefrom that there is no authority or warrant of law for the maintenance of this action against and in the name of this unincorporated organization or association.

64. For that the complainants ask equitable relief without submitting themselves to the jurisdiction of this Court and are not amenable to this Court and not amenable to the process of this Court.

65. For that the record shows that this Court has no jurisdiction of the members of this association and has no power to render a decree affecting their individual rights.

66. For that it affirmatively appears that this Court has no jurisdiction to render a money decree against any of the members of this association or as against this association as such.

67. For that it affirmatively appears that the decree of this Court would be unenforceable as against the individual members of this association.

68. For that it affirmatively appears that this Court has no jurisdiction over the non-resident members of this association and can not interfere with their freedom of contract.

69. For that this Court judicially knows that the members of this association are not liable for the tortuous acts of officers or agents of the association done without the authorization, approval or ratification of the said members.

70. For this Court judicially knows that the officers of this association have no power to bind the individual members of the said association in any way.

71. For that this association is not a proper party respondent to this substituted amended bill of complaint.

72. For that this association is not a legal entity.

[fol. 121] 73. For that no affirmative relief can be granted against this unincorporated association on this cause of action.

74. For that the said substituted amended bill of complaint is multifarious in that it seeks to combine in the one substituted amended bill of complaint a great number of separate and individual causes of actions by various parties complainants, each standing on separate facts and circumstances and each demanding its own individual and separate class and degree of relief.

75. For that it affirmatively appears therefrom that the rights of the various parties complainants vary widely in the class and type of relief sought as well as the degree of the relief to which they are entitled and therefore, the said substituted amended bill of complaint is multifarious.

76. For that it is *now* shown thereby that the complainants or any of them will suffer irreparable injury by the putting into effect of the alleged contract.

77. For that it affirmatively appears therefrom that there are parties who are not made parties respondent to the substituted amended bill of complaint and whose rights will be injuriously and adversely affected by the decree sought, and who are indispensable parties to this substituted amended bill of complaint.

78. For that it appears that the white firemen who will be displaced by the relief sought are indispensable parties to this procedure.

79. For that it affirmatively appears therefrom that the questions presented are moot.

80. For that it affirmatively appears therefrom that the complainant has been restored to "the pool."

81. For that the allegations that all the white firemen who have been in "the pool" at any time material herein or who are now in "the pool," or who may be eligible for "the pool," are fully and fairly represented by said Brotherhood in this proceeding, is a conclusion of the pleader.

82. For that the allegation that said notice, agreement and modification have been approved by all the white firemen on the defendant railroad is not sufficient to charge that

said firemen actually participated in the wrongful acts charged or ratified same.

[fol. 122] 83. For that the approval by any of the white firemen of the acts complained of is not sufficient to impose upon them legal liability.

84. For that it affirmatively appears from the substituted amended bill of complaint, as last amended, and the exhibits thereto that the rates, rules and working conditions as provided by the Locomotive Firemen and Hostlers' schedule was subject to thirty days written notice by either party.

85. For that it does not appear that the complainant's respective contracts of employment have been breached; but it affirmatively appears that the defendant railroad company was within its legal rights in modifying the complainant's respective contracts.

II

And this respondent demurs to that aspect of said substituted amended bill of complaint which prays a perpetual injunction and for grounds of said demurrer sets down and assigns the following:

1. There is no equity in the said aspect of the substituted amended bill of complaint.

2. It affirmatively appears that complainants have an adequate remedy at law.

3. For that the rights which complainants claim therein are not rights which equity will protect by injunction.

4. For that it affirmatively appears that a decree in conformance with the prayer for an injunction would be unenforceable.

5. For that a decree in conformance with the prayer for an injunction would not be enforceable as against the members of this association.

6. For that this Court has no sufficient jurisdiction to render a decree enjoining the members of this association from doing the things and matters complained of therein.

7. For that the granting of the relief prayed for therein as against this respondent would constitute a denial of due process of law.

8. For that it does not appear therefrom that the members of this association, or any of them, participated in any way in the wrongful acts complained of or that the members of this association or any of them in any way authorized, ratified or approved of such action.

[fol. 123] 9. For that the same is not a cause of action for or upon which the complainant therein may maintain such an action against the members of this organization or association.

10. For that the relief therein prayed, if granted, would not be enforceable as against the members of this association.

11. For that it affirmatively appears therefrom that there are parties who are not made parties respondent to the substituted amended bill of complaint and whose rights will be injuriously and adversely affected by the decree sought, and who are indispensabe parties to this substituted amended bill of complaint.

12. For that it appears that the white firemen who will be displaced by the relief sought are indispensable parties to this procedure.

13. For that the same amounts to a bill for specific performance.

14. For that it affirmatively appears therefrom that the questions presented are moot.

15. For that it affirmatively appears therefrom that the complainant has been restored to "the pool."

16. For that under the alleged contract, the breach of which complainant seeks to enjoin, the complainants would not receive anything unique in value, but would receive only money.

III

And this respondent demurs to that aspect of the substituted amended bill of complaint which seeks a discovery, and

for grounds of said demurrer, sets down and assigns the following:

1. For that the said substituted amended bill of complaint is not sworn to.

2. For that the allegations thereof are not made under oath.

3. For that there is no equity in the said aspect of the substituted amended bill.

4. For that it affirmatively appears therefrom that the complainants have an ad-quate remedy at law.

5. For that complainants show no right to a discovery.

6. For that the allegations of the said aspect of the substituted amended bill are so vague, indefinite and uncertain, and the prayer thereof is so vague, indefinite and uncertain that this respondent is not apprised of what it is [fol. 124] called upon to defend or what it is called upon to produce in the way of a discovery.

7. For that the said allegations of the said aspect of the substituted amended bill are so vague, indefinite and uncertain that this respondent is not apprised thereby of what information the said complainants are seeking or what information they are entitled to.

8. For that the same is not a cause of action for or upon which the complainant therein may maintain such an action against the members of this organization or association.

9. For that the relief therein prayed, if granted, would not be enforceable as against the members of this association.

10. For that no facts are alleged which show that the members of this association have the information, a discovery of which is prayed.

11. For that there is alleged no duty on the part of the members of this association to give the complainants, or any of them, a discovery of the information therein sought.

12. For that it does not appear therefrom that the members of this association, or any of them, participated in

any way in the wrongful acts complained of or that the members of this association or any of them in any way authorized, ratified or approved of such action.

IV

And this respondent demurs to that aspect of the substituted amended bill of complaint which seeks an injunction against this respondent enjoining it and its members and each of them from purporting to act as representatives under the Railway Labor Act for all of the locomotive firemen on the defendant railroad, and for grounds of said demurrer, sets down and assigns the following:

[fol. 125] 1. There is no equity in the said aspect of the substituted amended bill.

2. For that it affirmatively appears therefrom that the complainants have an adequate remedy at law.

3. For that it affirmatively appears from the allegations thereof that this association has a right under the said Railway Labor Act to act as representative for all the locomotive firemen on the said defendant railroad.

4. For that this Court has no power to bind the members of this association by any decree rendered in this cause.

5. For that it affirmatively appears therefrom that this is not a cause of action for or upon which the complainants therein may maintain such a cause of action against the members of this association or organization.

6. For that it affirmatively appears therefrom that there are parties who are not made parties respondent to the substituted amended bill of complaint and whose rights will be injuriously and adversely affected by the decree sought and who are indispensable parties to this substituted amended bill of complaint.

7. For that it appears that the white firemen who will be displaced by the relief sought are indispensable parties to this procedure.

8. For that it affirmatively appears that complainant's alleged rights have been restored.

V

And this respondent demurs to that aspect of the substituted amended bill of complaint which seeks a declaratory judgment, and for grounds of said demurrer, sets down and assigns the following:

1. There is no equity in the said aspect of the substituted amended bill.

2. For that it affirmatively appears therefrom that the complainants have an adequate remedy at law.

3. For that it affirmatively appears therefrom that there is not a cause of action for or upon which the complainants therein may maintain such an action against the members of this association.

[fol. 126] 4. For that it affirmatively appears therefrom that there are parties who are not made parties respondent to the substituted amended bill of complaint, and whose rights will be injuriously and adversely affected by the decree sought, and who are indispensable parties to this substituted amended bill of complaint.

5. For that it appears that the white firemen who will be displaced by the relief sought are indispensable parties to this procedure.

6. For that it does not appear therefrom that there is any justiciable controversy between the complainants or any of them and the members of this association.

7. For that it does not appear that there is any justiciable controversy between complainants and this respondent.

8. For that it affirmatively appears that an adequate relief and an appropriate remedy are presently available to the complainants through other existing forms of actions or proceedings.

VI

And this respondent demurs to that aspect of the substituted amended bill of complaint which seeks damages against this Brotherhood and for grounds of said demurrer, sets down and assigns the following:

1. For that there is no equity in the said aspect of the substituted amended bill.

2. For that it affirmatively appears therefrom that the complainants have an adequate remedy at law.

3. For that it affirmatively appears therefrom that this is not a cause of action for or upon which the complainants therein may maintain such an action against the members of this association.

4. For that it is not alleged therein that the members of this association participated in any way in, or in any way ratified, confirmed or approved the said action complained of.

5. For that it does not appear therefrom that the said contracts were negotiated or executed by agents, servants or employees of the members of this association acting [fol. 127] within the line and scope of their employment.

6. For that there is no authority or warrant of law for the awarding of damages to a class.

7. For that there is no authority or warrant of law for the awarding of a decree requiring affirmative action on the part of the respondent in favor of a class.

VII

And this respondent demurs to that aspect of the substituted amended bill of complaint which seeks relief on behalf of the other negro locomotive firemen of the defendant railroad as a class, and for grounds of said demurrer, sets down and assigns the following:

1. For that it appears therefrom that the interests of the negro firemen on the S. & N. A. Seniority Division of the L. & N. Railroad Company are different in kind, class, and degree from the negroes on the other divisions of said railroad.

2. For aught appearing therefrom, many of the parties sought to be made parties complainant will not be injuriously affected by the action complained of.

3. For that it does not appear that any of the parties who are sought to be made parties complainant with the exception of complainant, Steele have suffered any injury, damages or invasion of right.

4. For that it does not appear that the contracts of the various parties sought to be made complainants embody the terms of the said Firemen's and Hostlers' Schedule.

5. For that it does not appear therefrom that the various parties complainant have any seniority rights.

6. For that it does not appear therefrom that the various parties complainant are entitled to any seniority rights or privileges or preference of runs.

7. For that it does appear therefrom that the various parties complainant have any vested property right which has been invaded by the actions complained of.

8. For that there is no equity in the said aspect of the substituted amended bill.

9. For that it affirmatively appears that the complainants [fol. 128] have an adequate remedy at law.

10. For that it does not appear therefrom that the complainant has the authority to represent said class.

11. For that it does not appear therefrom that the interests of the class which the complainant seeks to represent are identical with his own.

12. For that it affirmatively appears therefrom that the rights of the various parties sought to be represented by class are widely variant as to the class and type of relief to which they are entitled, if any, and also as to the degree of relief to which they are entitled.

13. For that it affirmatively appears therefrom that this is not a cause of action for or upon which the complainants therein may maintain such an action against the members of this association.

14. For that there is no authority or warrant of law for the awarding of damages to a class.

15. For that there is no authority or warrant of law for the awarding of a decree requiring affirmative action on the part of the respondent in favor of a class.

16. For that it affirmatively appears therefrom that there are parties who are not made parties respondent to the substituted amended bill of complaint, and whose rights

will be injuriously and adversely affected by the decree sought, and who are indispensable parties to this substituted amended bill of complaint.

17. For that it appears that the white firemen who will be displaced by the relief sought are indispensible parties to this procedure.

Harold C. Heiss, Lange, Simpson, Brantley & Robinson, Solicitors for Respondent, Brotherhood of Locomotive Firemen and Enginemen, an unincorporated association.

IN CIRCUIT COURT OF JEFFERSON COUNTY

DEMURRER OF W. H. THOMAS, TO THE SUBSTITUTED AMENDED BILL—Filed September 16, 1942

Comes the respondent, W. H. Thomas, one of the respondents named in the substituted amended bill of complaint, and demurs to the substituted amended bill of com- [fol.129] plaint as a whole, and as grounds of said demurrer, sets down and assigns the following, separately and severally:

I

1. There is no equity in the bill.

2. For that there is a misjoinder of parties respondent.

3. For that this respondent wrongfully is joined with the other parties respondent named therein.

4. For that no joint cause of action is stated against this respondent and any other respondent named in the said bill.

5. For that it does not appear therefrom that the individuals who negotiated the alleged contracts attached as exhibits to the said bill were agents, servants or employees of this respondent acting within the line and scope of their employment as such.

6. For that there does not appear therefrom any reason why this respondent should be held accountable for the alleged wrongful acts therein set out.

7. For that the allegation that complainant's contract embodied the standard provisions of the Firemen's and Hostlers' Schedule issued March 1, 1929, is a conclusion of the pleader.

8. For that the allegation that the complainant's employment status is a vested property right is a conclusion of the pleader.

9. For that the allegation that the white members of the Brotherhood have designated said Brotherhood as the exclusive bargaining agent and grievance representative for the entire craft or class of firemen on defendant railroad is a conclusion of the pleader.

10. For that the averments thereof are so vague, indefinite and uncertain that this respondent is not sufficiently apprised as to what actions on its part are complained of by the various parties complainant.

11. For that the same does not allege that the persons whose names appear on Exhibits 1 and 2 as signing on behalf of the Brotherhood of Locomotive Firemen and Enginemen and Brotherhood of Locomotive Firemen and Enginemen Committee were authorized by this respondent to execute said document, or that said execution was rati- [fol. 130] fied by this respondent.

12. For that the averments of the substituted amended bill are not definite and certain enough to apprise this respondent what it is called upon to defend.

13. For that it does not appear therefrom by what right plaintiff brings suit as a class suit on behalf of the other negro locomotive firemen on the defendant's railroad.

14. For that there is a misjoinder of parties complainant.

15. For that the decree prayed for by complainant on behalf of the class which he seeks to represent would be unenforceable.

16. For that the complainant has an adequate remedy at law.

17. For that the said substituted amended bill of complaint shows on its face that if the complainant has suffered wrong, he has an adequate remedy at law against the

respondent railroad company by way of damages for breach of contract.

18. For that the said substituted amended bill of complaint fails to allege any wrong doing by this respondent.

19. For that no facts are alleged which show that this respondent was under any duty to the complainants.

20. For that no facts are alleged to show any breach of duty by this respondent.

21. For this Court judicially knows that the officers of a labor union have no power to bind the individuals of the association in any way.

22. For that there is a misjoinder of parties respondent in that some of the parties respondent are necessary parties to the bill in one aspect and unnecessary parties to it in the other.

23. For that this respondent is wrongfully joined in that it is an unnecessary party to certain aspects of the bill. [fol. 131] 24. For that it appears that the white firemen who will be displaced by the relief sought are indispensable parties to this procedure.

25. For that the approval by any of the white firemen of any of the facts complained of is not sufficient to impose liability upon this respondent.

26. For that it affirmatively appears from the bill of complaint, as last amended, and the exhibits thereto that the rates, rules and working conditions as provided by the Locomotive Firemen and Hostler's Schedule was subject to 30 days' written notice by either party.

27. For that it does not appear that complainant's respective contracts of employment have been breached; but it affirmatively appears that the defendant railroad company was within its legal rights in modifying the complainant's respective contracts.

28. For that it affirmatively appears therefrom that the questions presented are moot.

29. For that it affirmatively appears therefrom that the complainant has been restored to "the pool."

II

And this respondent demurs to that aspect of the said substituted amended bill of complaint which prays a perpetual injunction, and for grounds of said demurrer, sets down and assigns the following:

1. There is no equity in the said aspect of the said substituted amended bill of complaint.

2. It affirmatively appears that complainants have an adequate remedy at law.

3. For that the rights which complainants claim therein are not rights which equity will protect by injunction.

4. For that it affirmatively appears that a decree in conformance with the prayer for an injunction would be unenforceable.

5. For that a decree in conformance with the prayer for an injunction would not be enforceable as against the members of this association.

6. For that the Court knows it is not within the power of this respondent to comply with the decree in conformity with the prayer.

[fol. 132] 7. For that the granting of the relief prayed for therein as against this respondent would constitute a denial of due process of law.

8. For that the relief therein prayed, if granted, would not be enforceable as against this respondent.

9. For that it affirmatively appears therefrom that there are parties who are not made parties respondent to the substituted amended bill of complaint and whose rights will be injur-ously and adversely affected by the decree sought, and who are indispensable parties to this substituted amended bill of complaint.

10. For that it appears that the white firemen who will be displaced by the relief sought are indispensable parties to this procedure.

11. For that the same amounts to a bill for specific performance.

12. For that under the alleged contract, the breach of which complainant seeks to enjoin, the complainants would

not receive anything unique in value, but would receive only money.

13. For that it affirmatively appears therefrom that the questions presented are moot.

14. For that it affirmatively appears therefrom that the complainant has been restored to "the pool."

III

And this respondent demurs to that aspect of the substituted amended bill of complaint which seeks discovery and for grounds of said demurrer sets down and assigns the following:

1. For that the said substituted amended bill of complaint is not sworn to.

2. For that the allegations thereof are not made under oath.

3. For that there is no equity in the said aspect of the substituted amended bill of complaint.

4. For that it affirmatively appears therefrom that the complainants have an adequate remedy at law.

5. For that complainants show no right to a discovery.

6. For that the allegations of the said aspect of the substituted amended bill are so vague, indefinite and uncertain and the prayer thereof is so vague, indefinite and uncertain that this respondent is not apprised of what it is called upon [fol. 133] to defend or what it is called upon to produce in the way of a discovery.

7. For that the said allegations of the said aspect of the substituted amended bill are so vague, indefinite and uncertain that this respondent is not apprised thereby of what information the same complainants are seeking or what information they are entitled to.

8. For that the relief therein prayed, if granted, would not be enforceable as against this respondent.

9. For that no facts are alleged which show that this respondent had or has access to the information, a discovery of which is prayed.

10. For that there is alleged no duty on the part of this respondent to give to the complainants or any of them a discovery of the information therein sought.

IV

This respondent demurs to that aspect of the substituted amended bill of complaint which seeks an injunction against the respondent brotherhood and its members and each of them from purporting to act as representatives under the Railway Labor Act for all of the locomotive firemen of the defendant railroad, and for grounds of said demurrer, sets down and assigns the following:

1. There is no equity in the said aspect of the substituted amended bill.

2. For that it affirmatively appears therefrom that the complainants have an adequate remedy at law.

3. For that this respondent is an improper party to said aspect.

4. For this respondent is an unnecessary party to said aspect.

V

And this respondent demurs to that aspect of the substituted amended bill of complaint which seeks a declaratory judgment, and for grounds of demurrer sets down and assigns the following:

[fol. 134] 1. There is no equity in the said aspect of the substituted amended bill.

2. For that it affirmatively appears therefrom that the complainants have an adequate remedy at law.

3. For that it does not appear therefrom that there is any justiciable controversy between complainants or any of them and this respondent.

4. For that it does not appear that there is any justiciable controversy between complainants and this respondent.

5. For that it affirmatively appears that an adequate relief and an appropriate remedy are presently available to the complainants through other existing forms of action or proceedings.

VI

And this respondent demurs to that aspect of the substituted amended bill of complaint which seeks damages against the Brotherhood, and for grounds of demurrer, sets down and assigns the following:

1. There is no equity in the said aspect of the substituted amended bill.

2. For that this respondent, merely by virtue of his connection with the Brotherhood, is not a proper party to said aspect of the said bill.

3. For that it is not alleged therein that this respondent authorized or ratified the alleged wrongful acts complained of.

4. For that there is no authority or warrant of law for the awarding of damages to a class.

5. For that there is no authority or warrant of law for the awarding of a decree requiring affirmative action on the part of the respondent in favor of a class.

6. For that the facts alleged do not warrant a personal judgment for damages against this respondent.

[fol. 135] VII

And this respondent demurs to this aspect of the said substituted amended bill of complaint which seeks relief on behalf of the other negro locomotive firemen of the defendant railroad as a class, and for grounds of said demurrer sets down and assigns the following:

1. For that it appears therefrom that the interests of the negro firemen on the S. and N. A. Seniority Division of the L. and N. Railroad Company are different in kind, class, and degree from the negroes on the other divisions of said railroad.

2. For aught appearing therefrom, many of the parties sought to be made parties complainant will not be injuriously affected by the action complained of.

3. For that it does not appear that any of the parties who are sought to be made parties complainant with the exception of complainant Steele have suffered any injury, damages or invasion of right.

4. For that it does not appear that the contracts of the various parties sought to be made complainants embody the terms of the said Firemen's and Hostlers' Schedule.

5. For that it does not appear therefrom that the various parties complainant have any seniority rights.

6. For that it does not appear therefrom that the various parties complainant are entitled to any seniority rights or privileges or preference of runs.

7. For that it does not appear therefrom that the various parties complainant have any vested property right which has been invaded by the actions complained of.

8. For that there is no equity in the said aspects of the substituted amended bill.

9. For that it affirmatively appears that the complainants have an adequate remedy at law.

10. For that it does not appear therefrom that the complainant has the authority to represent said class.

11. For that it does not appear therefrom that the interest of the class which the complainant seeks to represent are identical with his own.

12. For that it affirmatively appears therefrom that the rights of the various parties sought to be represented by class are widely variant as to the class and type of relief [fol. 136] to which they are entitled, if any, and also as to the degree of relief to which they are entitled.

13. For that it affirmatively appears therefrom that this is not a cause of action for or upon which the complainants therein may maintain such an action against the members of this association.

14. For that there is no authority or warrant of law for the awarding of damages to a class.

15. For that there is no authority or warrant of law for the awarding of a decree requiring affirmative action on the part of the respondent in favor of a class.

16. For that it affirmatively appears therefrom that there are parties who are not made parties respondent to the substituted amended bill of complaint, and whose rights will be injuriously and adversely affected by the decree

sought, and who are indispensable parties to this substituted amended bill of complaint.

17. For that there is a misjoinder of parties complainant.

18. For that there is a misjoinder of parties respondent.

19. For that this respondent is an improper party respondent to said bill.

20. For this respondent is improperly joined as party respondent.

21. For that no joint cause of action is alleged against this respondent or any other parties respondent to the said substituted amended bill of complaint.

Harold C. Heiss, Lange, Simpson, Brantley & Robinson, Solicitors for Respondent, W. H. Thomas.

IN CIRCUIT COURT OF JEFFERSON COUNTY

PLEA IN ABATEMENT OF J. P. ADAMS TO THE SUBSTITUTED AMENDED BILL—Filed September 17, 1942

Comes J. P. Adams, named as respondent in the substituted amended Bill of Complaint in this cause, and appearing specially for the purpose of pleading in abatement and for the purpose of testing the jurisdicton of ths Court, and for no other purpose, prays judgment of the Court that the Summons and Bill of Complaint be quashed because he says that he is a resident and citizen of the State of Alabama and a resident and cftizen of Montgomery County, Alabama; that he is not a resident of Jefferson County, Alabama; that the act or omission complained of in the Bill of Complaint did not occur in Jefferson County, Alabama.

This respondent says further that he is wrongfully joined as a party respondent to the said subsfituted amended [fol. 137] Bill of Complaint; that the same does not state a joint cause of action against him and any other party respondent who might be correctly sued in Jefferson County, Alabama, under the particular type of cause of action attempted to be set up in the said substituted amended Bill of Complaint.

Wherefore, he prays judgment on the said Summons and Bill of Complaint, and that the same be quashed.

J. P. Adams.

Duly sworn to by J. P. Adams. Jurat omitted in printing.

IN CIRCUIT COURT OF JEFFERSON COUNTY

PLEA IN ABATEMENT OF B. F. McGILL TO SUBSTITUTED AMENDED BILL—Filed September 19, 1942

Comes *B. F.* McGill, named as respondent in the substituted amended Bill of Complaint in this cause, by his solicitors, and appearing specially for the purpose of pleading in abatement and for the purpose of testing the jurisdiction of this Court, and for no other purpose, prays judgment of the Court that the Summons and Bill of Complaint be quashed because he says that he is a resident and citizen of the State of Alabama and a resident and citizen of Mobile County, Alabama; that he is not a resident of Jefferson County, Alabama; that the act or omission complained of in the Bill of Complaint did not occur in Jefferson County, Alabama.

This respondent says further that he is wrongfully joined as a party respondent to the said substituted amended Bill of Complaint; that the same does not state a joint cause of action against him and any other party respondent who might be correctly sued in Jefferson County, Alabama, under the particular type of cause of action attempted to be set up in the said substituted amended Bill of Complaint.

Wherefore, he prays judgment on the said Summons and Bill of Complaint, and that the same be quashed.

[fol. 138] Harold C. Heiss, Lange, Simpson, Brantley & Robinson, Solicitors for respondent B. F. McGill, appearing specially.

Duly sworn to by Oliver Brantley. Jurat omitted in printing.

IN CIRCUIT COURT OF JEFFERSON COUNTY

AMENDED PLEA IN ABATEMENT OF F. B. McGILL TO SUBSTITUTED AMENDED BILL—Filed September 26, 1942

Comes F. B. McGill, named as respondent in the substituted amended Bill of Complaint, and still appearing specially for the purpose of pleading in abatement and for no other purpose, amends his Plea in Abatement heretofore filed in this cause by adding thereto the following affidavit:

STATE OF ALABAMA,
Mobile County:

Before me, A. L. Sclater, Sr., a Notary Public in and for said County and State, personally appeared *B. F.*

McGill, known to me, who first being duly sworn according to law deposes and says that he has read the Plea in Abatement heretofore filed on his behalf in this cause and the allegations of the same are true and correct.

[fol. 139] F. B. McGill.

Sworn to and subscribed before me this 26th day of September, 1942. A. L. Sclater, Sr., Notary Public, Mobile County, Alabama. (Seal.) Harold C. Heiss, Lange, Simpson, Brantley & Robinson, Attorneys for respondent F. B. McGill.

In Circuit Court of Jefferson County

Minute Entries of Submission on Pleadings—January 11, 1943

On this the 11th day of January, 1943, it is ordered by the Court, that this cause be submitted for a decree on the Plea in Abatement of J. P. Adams and F. B. McGill.

On this the 11th day of January, 1943, it is ordered by the Court that this cause be submitted for a decree on the demurrers of Louisville and Nashville Railroad Company, refiled to substituted amended Bill of Complaint; and demurrers of Brotherhood of Locomotive Firemen and Enginemen, to the substituted amended Bill of Complaint, and demurrers of W. H. Thomas to the substituted amended Bill of Complaint.

In Circuit Court of Jefferson County

Decree Sustaining Demurrers and Dismissing Bill—April 27, 1943

This Cause coming on to be heard is submitted for decree upon demurrer of respondent, Louisiville & Nashville Railroad Company, refiled to the substituted Bill of Complaint, and demurrer of respondent Brotherhood of Locomotive Firemen and Enginemen to the substitute Bill of Complaint and the demurrer of W. H. Thomas to the substitute Bill of Complaint.

The substitute Bill of Complaint charges a conspiracy among the respondent Railroad Corporation, the Brother-

hood of Locomotive Firemen and Enginemen, its representatives and its several members to fraudulently eliminate from the services of the Railroad the Complainant [fol. 140] and other negro firemen, or to discriminate against them in such a way as to give the white firemen, members of said association, advantage in employment status, rate of pay, etc. While the bill in general terms charges fraud and discrimination against the negro firemen, the specific wrong complained of is that representatives of the Brotherhood of Locomotive Firemen and Enginemen (who were statutory representatives of all firemen) and the respondent Louisville & Nashville Railroad Company entered into an employment agreement February 8, 1941, and modified on May 12, 1941, under the terms of which negro firemen, including the complainant, suffered injury and damage.

From a careful analysis of the Bill it appears that any relief to which plaintiff is entitled must be predicated upon injuries sustained by him from the wrongful execution of the contract of 1941.

The rights allegedly taken away from him by such contract arose from a former contract negotiated for him and others by the same Brotherhood. It is admitted by complainant that the Brotherhood of Locomotive Firemen and Enginemen has the legal right to select bargaining representatives for the entire class. It is also admitted that the universal practice among the railroads of the country is to promote only white firemen to the position of engineer; and that complainant is one of a group of colored firemen who are non-promotable under such practice. No direct relief is here sought against that practice. The contract complained of discloses a plan of operation whereby the number of negro firemen is to be reduced and certain of their privileges under the former contract abridged.

The contract of 1941 appears on its face as one designed to increase the number of promotable firemen. It makes available more men who may be ultimately promoted to the position of engineer. Such plan may have been necessary to the proper operation of the railroad. In any event the Bill fails to negative such necessity or to aver that a contract more favorable to complainant and his class was a practical possibility. The general allegations of fraud and discrimination in the execution of the contract are not

assumed to be true merely because its provisions are not as favorable to the entire group of employees, or a portion thereof, as were the provisions of a former contract. [fol. 141] The Court is therefore of the opinion that the Bill of Complaint contains on equity; that the demurrers should be sustained and Bill of Complaint dismissed. It is therefore,

Ordered, Adjudged and Decreed by the Court that the separate and several demurrers of the respondents, Louisville & Nashville Railroad Company, Brotherhood of Locomotive Firemen and Enginemen, and W. H. Thomas to the substitute Bill of Complaint be and they are hereby separately and severally sustained and said Bill of Complaint is hereby dismissed. Court costs in this cause are hereby taxed against complainant for which let execution issue..

Done and Ordered, this the 27th day of April, 1943.

E. M. Creel, Circuit Judge, In Equity Sitting.

Bond on Appeal for Costs approved and filed May 22, 1943, omitted in printing.

[fol. 142] In Circuit Court of Jefferson County

Citation of Appeal

To Brotherhood of Locomotive Firemen and Enginemen, an Unincorporated Association, et al., or to Lange, Simpson, Brantley & Robinson, and Harold C. Heiss, Solicitors of Record:

Whereas, on the 22nd day of May, 1943, Bester William Steele took an appeal from the decree rendered on the 27th day of April, 1943, by the Circuit Court of Jefferson County, in the cause of Bester William Steele, against Louisville and Nashville Railroad Company, et al.,

Now, Therefore, you are cited to appear as required by law, before the Supreme Court of Alabama, to defend on said appeal, if you think proper so to do.

Witness my hand this the 24th day of May, 1943.

G. H. Boyd, Register.

Executed this the 25th day of May, 1943, on Lange, Simpson, Brantley and Robinson, by leaving a copy of within with Jim Simpson, Agent.

Holt A. McDowell, Sheriff, Jefferson Co. Ala., by Roy Culver, D. S.

Harold C. Heiss not found in Jefferson County this the 25th day of May, 1943.

Hold A. McDowell, Sheriff, Jefferson Co., Ala., by Roy Culver, D. S.

IN CIRCUIT COURT OF JEFFERSON COUNTY

CITATION OF APPEAL

To Louisville and Nashville R. R. Company, et al., or to Gibson and Gibson, Solicitors of Record:

Whereas, on the 22nd day of May, 1943, Bester William Steele, took an appeal from the decree rendered on the 27th day of April, 1943 by the Circuit Court of Jefferson County, in the cause of Bester William Steele, against Louisville and Nashville Railroad Company, et al.,

[fol. 143] Now, Therefore, you are cited to appear as required by law, before the Supreme Court of Alabama, to defend on said appeal, if you think proper so to do.

Witness my hand this the 22nd day of May, 1943.

G. H. Boyd, Register.

Executed this the 24th day of May, 1943, by leaving a copy of the within with Gibson & Gibson.

Holt A. McDowell, Sheriff, Jefferson Co., Ala., by Ben L. Ingram, D. S.

IN CIRCUIT COURT OF JEFFERSON COUNTY

MOTION RE TRANSMITTAL OF EXHIBITS—Filed June 11, 1943

Comes the Appellant, and the separate and several appellees and shows unto the Court as follows:

1st. That a decree sustaining the demurrers and dismissing the Bill of Complaint was rendered in the above entitled cause on the 27th day of April, 1943, and the Complainant, Bester William Steele has filed a security for

costs of appeal to the Supreme Court, all of which appears of record in this Court.

2nd. That there was attached to the substituted amended Complaint Exhibit Number One, which is a small book entitled "Agreement between the Louisville & Nashville Railroad, and its Locomotive Firemen and Hostlers in accord with Mediation Agreement, Arbitration Award, and Supplementary Agreement,"—also attached to Amendment to the amended Bill of Complaint is Complainant's Exhibit "AA", which is a small book entitled "Agreement between the Louisville & Nashville Railroad and its Locomotive Firemen and Hostlers in accord with Mediation Agreement, Arbitration Award, and Supplementary Agreement," and upon investigation of the above exhibits it has been concluded that in view of the particular character of these respective exhibits, it is necessary that the original exhibits be transmitted to the Clerk of the Supreme Court in order that same may be personally inspected by the Judges of the said Court.

Wherefore, the premises considered, the respondent prays that this Court order the Register to send the Exhibits hereinabove referred to with the proper certificate attached, to the Clerk of the Supreme Court, and that the same be considered a part of the original Supreme Court record.

[fol. 144] This the 11th day of June, 1943.

Arthur D. Shores, Solicitor for Appellant; Chas. H. Eyster & White E. Gibson, Solicitors for L. & N. R. R. Co.; Lange, Simpson, Brantley & Robinson, Solicitors for Brotherhood, L. F. & E.

IN CIRCUIT COURT OF JEFFERSON COUNTY,

ORDER RE TRANSMITTAL OF EXHIBITS—June 23, 1943

Upon consideration of the foregoing motion of the parties in this cause, to have certain Exhibits described in said Motion transmitted to the Supreme Court for its inspection, coming on to be heard, and the same having been considered and understood by the Court, it is Ordered, Adjudged and Decreed by the Court that the Register send to the Clerk of the Supreme Court the Complainant's Exhibit "AA", and

complain-t's Exhibit Number One, in order that said exhibits may be personally inspected by the Judges of said Court.

Done and Ordered, this the 23rd day of June, 1943.

J. Russell McElroy, Circuit Judge. In Equity Sitting.

[fol. 145] In Circuit Court of Jefferson County

Certificate of the Register Re-Appeal and Record—June 24, 1943

I, G. H. Boyd, Register of the Circuit Court, Tenth Judicial Circuit of Alabama, in Equity, do hereby certify that the Complainant, Bester William Steele, in a cause pending in said Court wherein Bester William Steele is the Complainant, and Louisville And Nashville Railroad Company, Brotherhood Of Locomotive Firemen And Enginemen, an unincorporated Association, et al., are the Respondents, has taken an appeal from the Decree of said Court rendered on the 27th day of April, 1943, to the Supreme Court of Alabama.

And I do further certify that said appeal was taken on the 22nd day of May, 1943, and is returnable to the present term of the said Supreme Court.

And I do further certify that the for-going pages numbered from One (1) to One Hundred twenty-three (123), both inclusive, contains a full, true correct and complete transcript of the record and all proceedings in said cause and a copy of the security for costs of appeal to Supreme Court.

Witness my hand and seal of office, this the 24th day of June, 1943.

J. H. Boyd, Register.

[fol. 146] In Supreme Court of Alabama

[Title omitted]

Assignments of Error

Comes the appellant and says there is manifest error in the record, in this:

1. The court erred in sustaining the separate and several demurrers of respondent, Louisville & Nashville Railroad

Company to petitioners substitute Bill of Complaint, as is shown on page 120 of the transcript.

2. The court erred in sustaining the separate and several demurrers of respondent Brotherhood of Locomotive Firemen & Enginemen to petitioner's substitute Bill of Complaint as is shown on page 120 of the transcript.

3. The court erred in sustaining the demurrers of respondent, W. H. Thomas to petitioner substitute Bill of Complaint as shown on page 120 of the transcript.

4. The court erred in dismissing the petitioners substitute Bill of Complaint as is shown on page 120 of the transcript.

Arthur D. Shores, Solicitor of Complainant.

[fol. 147] IN THE SUPREME COURT OF ALABAMA

BESTER WILLIAM STEELE

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, et al.

MINUTE ENTRIES OF ARGUMENT AND SUBMISSION—November 23, 1943

Come the parties by attorneys, and the argument in this cause having been begun, but not concluded, the cause is passed to Wednesday, November 24th, 1943, at 10 o'clock, A. M.

[fol. 148] [Title omitted]

(November 24, 1943)

Come the parties by attorneys, and the argument in this cause having been concluded, the cause is submitted for decision.

[fol. 149] IN THE SUPREME COURT OF ALABAMA

6 Div. 153

BESTER WILLIAM STEELE

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, etc., et al.

DECREE—January 13, 1949

Come the parties by attorneys, and the record and matters therein assigned for errors, being argued and submitted and duly examined and understood by the Court, it is considered that in the record and proceedings of the Circuit Court there is no error. It is therefore considered and ordered that the decree of the Circuit Court be in all things affirmed.

It is also considered and ordered that the Appellant, Bester William Steele, and Fidelity and Deposit Company of Maryland, surety on the appeal bond, pay the costs of appeal of this Court and of the Circuit Court.

And it appearing that said parties have waived their right of exemptions under the laws of Alabama, let execution issue accordingly.

[fol. 150] IN THE SUPREME COURT OF ALABAMA.

BESTER WILLIAM STEELE

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, an unincorporated association, et al.

Appeal from Jefferson Circuit Court, in Equity

OPINION

GARDNER, Chief Justice:

Complainant Steele filed this bill against the Louisville & Nashville Railroad Company, a corporation, the Brotherhood of Locomotive Firemen and Enginemen, an unincorporated association, and named individuals connected with

the latter association. To the bill as last amended, which in fact is a substitute for the original bill, demurrers of the several defendants were sustained and the bill dismissed. [fol. 151] From this decree the complainant prosecutes this appeal.

The argument of counsel for the respective parties has assumed a rather wide range, but we think the discussion here may be brought within a narrow compass. Omitting any detailed recital of the bill's averments, the salient facts are as follows:

Complainant is a Negro fireman, in the employ of the Louisville & Nashville Railroad since 1910, competent and rendering satisfactory service. Prior to the passage of the Railway Labor Act, and down to April 8, 1941, he had been serving as a fireman on a passenger train, assigned to what is known as the "South End Passenger Pool." This was a highly preferable job for a fireman. On April 1st, 1941, the jobs of this particular pool were bulletined for "bidding in" because the number of firemen in the pool had to be reduced due to reduction in mileage, but by virtue of a contract entered into between the defendant Railroad and the Brotherhood of Locomotive Firemen and Enginemen in February, 1941, subsequently modified in May, 1941, complainant was thrown out of work for a period of sixteen days (April 8th to April 24th, 1941), and firemen who were members of the Brotherhood given the preference. On April 25th, 1941, he was given a job on a local freight run, less desirable as to the character of work and less remunerative. In December following, he was placed as fireman on a switch engine, and worked in that capacity until January 3, 1942, when he was re-assigned to his original place in the South End Passenger Pool.

Negro firemen are ineligible to membership in the defendant Brotherhood. Negroes are not employed on rail- [fol. 152] roads as locomotive firemen except in the South. On the defendant Railroad there are four seniority districts, known as the South and North Alabama Division, the Montgomery and Mobile Division, the Mobile and New Orleans Division, and the Pensacola Division. On these four divisions Negro firemen are in the majority, but constitute a minority of the total number of firemen employed by the defendant Road. The Negro firemen and the Brotherhood firemen together comprise the entire craft or class

of firemen employed by the Railroad. The defendant Brotherhood is the representative of the entire craft or class of firemen with the defendant Road, and is so accepted by complainant and the other Negro firemen. Complainant's employment is individual, and he asserts no seniority rights by virtue of any individual contract with the defendant Road.

As we understand the bill, with its exhibits, complainant's claim for seniority rights arose out of the agreement entered into between the defendant Road and the Locomotive Firemen and Hostlers on March 1st, 1929. This agreement contains express stipulation that "the rates, rules, and working conditions as provided herein, shall be continued in effect, subject to 30 days' written notice by either party." Subsequently, as above noted, the defendant Brotherhood, under the Railway Labor Act, became the representative for the entire craft of firemen, and entered into an agreement with the defendant Road which considerably curtailed seniority rights of complainant, and which gave ground for the selection of others, members of the Brotherhood, in his stead.

It further appears from the bill that locomotive engineers are obtained by promotion of selected white locomotive firemen. This is the existing railroad practice in the United [fol. 153] States. To quote from the bill: "By traditional and universal railroad practice in the United States Negro firemen arbitrarily are never promoted to engineers regardless of knowledge, experience, competency, and worth." The bill further shows, to distinguish between white firemen as a class and Negro firemen as a class, the white firemen are known under standard railroad practice as "promotable men" while the Negro firemen are known as "non-promotable men."

On March 28th, 1940, the defendant Brotherhood gave due notice to the various railroads involved, including this defendant Road, of a request for the establishment of rules governing the employment and assignment of locomotive firemen and helpers. This change in the previous agreement brought about the restrictions to non-promotable firemen and privileges to promotable firemen which worked to complainant's disadvantage as indicated. This was in March, 1940, and the formal agreement was entered into nearly a year thereafter in February, 1941.

The bill seeks injunctive relief against the enforcement of this agreement, which, as we view it, is in effect a bill for the specific performance of the agreement of March, 1929. *Hewitt* v. *Magic City Furniture Co.*, 214 Ala. 265, 107 So. 745, 44 A. L. R. 1441; *Donovan* v. *Travers*, 285 Mass. 167.

In substance and effect the present bill appears to be the same as that presented by counsel for complainant here to the District Court of the United States for the Western District of Tennessee, which was disposed of upon the theory that no Federal question was properly presented. *Teague* v. *Brotherhood of Locomotive Firemen and Enginemen*, 127 F. (2d) 53.

[fol. 154] The recent cases of *Switchmen's Union* v. *National Mediation Board*, 88 L. Ed. 89; *General Committee, Brotherhood of Locomotive Engineers* v. *Missouri-Kansas-Texas Railroad Co.*, 88 L. Ed. 104; and *General Committee, Brotherhood of Locomotive Engineers* v. *Southern Pacific Co.*, 88 L. Ed. 112, have been called to our attention, but we are persuaded that the Court was dealing only with the matter of the question of representation, and these authorities are here considered of no controlling importance.

Reverting to *Teague* v. *Brotherhood of Locomotive Firemen and Enginemen*, supra, we may add that the Court in its opinion refers to the fact that in the last analysis complainant's seniority rights must rest upon contract, and that so far as the Fifth Amendment is concerned, it *relatives* only to governmental action and not to action by private persons. This observation should suffice, without further elaboration, as an answer to the constitutional question argued in brief.

So far as concerns the defendant Railroad, it has been definitely determined that the Railway Labor Act (Title 45 U. S. C. A. Sec. 151-188) placed a mandatory duty upon the Railroad to treat with the representative of the employees and with that representative only. *Virginian Railway* v. *Federation*, 300 U. S. 515. And for a willful failure, a rather heavy penalty is imposed. And under Sec. 152, Title 45 U. S. C. A., it is provided that the majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes therein named. In *Virginian Railway* v. *Federation*, supra, it was pointed out in the opinion that the act

did not purport to preclude individual contracts which the Railroad may elect to make directly with individual employees. "It imposes the affirmative duty to treat only with the true representative, and hence the negative duty to treat [fol. 155] with no other." See also 31 Am. Jr. page 899. Speaking as to the purpose of the Act in the Virginia Railway case, the court further observed: "More is involved than the settlement of a private controversy without appreciable consequences to the public. The peaceable settlement of labor controversies, especially where they may seriously impair the ability of an interstate rail carrier to perform its service to the public, is a matter of public concern." In the instant case the Brotherhood was the true representative, with which the Railroad was under duty to confer and negotiate.

In *Shaup* v. *Grand International Brotherhood of Locomotive Engineers*, 223 Ala. 202, 135 So. 327, we made reference to the seniority rights which arose by virtue of the agreement between the Brotherhood and the Railroad, subject to be vacated just as were complainant's seniority rights under the 1929 agreement, where we observed that such a right was somewhat intangible and could not be denominated a vested property right. We indicated, however, that an unlawful invasion or interference therewith by a third person would constitute a wrong of which the courts would take cognizance; citing *U. S. Fidelity Co.* v. *Millonas*, 206 Ala. 147, 89 So. 732, 29 A. L. R. 520. They cannot be vested property rights in the true sense, for the simple reason that they are subject to be modified or taken away entirely upon due notice, in accordance with the very terms of the contract.

As we have observed, the bill admits that complainant recognizes the defendant Brotherhood as its representative for collective bargaining with the Railroad. The Brotherhood, therefore, had a right to enter into the agreement of February, 1941, which modified to complainant's detriment [fol. 156] the agreement of 1929. In *Hartley* v. *Brotherhood of Ry. & S. S. Clerks, etc.*, 277 N. W. 885, The Supreme Court of Michigan, speaking of these collective bargaining agreements, referred to the fact that the complainant's seniority rights in that case were not acquired by virtue of any contract of employment with her employer, but by reason of the bargaining agreement, and this agreement was executed for all the members of the Brotherhood and not

for the individual benefit of the plaintiff. The Court observed:

> "When, by reason of changed economic circumstances, it became apparent that the earlier agreement should be modified in the general interest of all members of the Brotherhood it was within the power of the latter to do so, notwithstanding the result thereof to plaintiff. The Brotherhood had the power by agreement with the Railway to create the seniority rights of plaintiff, and it likewise by the same method had the power to modify or destroy these rights in the interest of all the members."

A like line of reasoning was followed by the North Carolina Court in *Coley* v. *Atlantic Coast Line R. R.*, 19 S. E. (2d) 124. See also *O'Keefe* v. *Local 463*, 117 A. L. R. 817; *Cameron* v. *International Alliance*, 97 A. L. R. 594; 31 Am. Jur. p. 896-899; note to *Louisville & Nashville Railway Co.* v. *Miller*, 142 A. L. R. 1050; note to *Piercy* v. *Louisville & Nashville Railway Co.*, 33 A. L. R. 322. The author of the note as found in 142 A. L. R. on page 1059, in speaking of the nature of seniority rights, observed: "As a starting point, the courts are apt to observe that seniority is not an inherent, natural, or constitutional right, and does not arise from mere employment, independently of contract, but exists by virtue of the contract between the employer and the union, inuring through the latter to the benefit of the members." Guided by these well-recognized principles, it [fol. 157] is clear enough complainant must be held to abide by the contract made with his recognized statutory representative.

In referring to the Brotherhood as complainant's representative, we mean to indicate a representative in a limited sense only. Indeed, the Massachusetts Court in *Donovan* v. *Travers*, supra, reached the conclusion that in no correct sense was the union an agent, but a principal. However that may be, to our mind it seems entirely clear that Congress, in providing for collective bargaining by representative of a craft or class, had no intention of creating a confidential relationship of principal and agent, such as would place a duty upon the agent to give notice to every employee of any action which might unfavorably affect him, and to make a due account for his actions, and be subject to liability for failing to so account.

Complainant appears to rest his case largely upon the doctrine of such confidential relationship; citing *Brasher v. First National Bank*, 232 Ala. 340, 168 So. 42; *Rogers v. Brightman*, 189 Ala. 228, 66 So. 71, where the exacting duties of such an agency are pointed out. But we think the Railway Labor Act merely intended that there be designated a representative chosen by the majority of the craft or class of employees to treat with the Railroad in regard to rates of pay, working conditions, and the like, and to bargain with reference to the whole without any notion of liability to the individual. See also *System Federation v. Louisiana & A. Ry. Co.*, 119 F. (2d) 509; *System Federation v. Louisiana & A. Ry. Co.*, 32 F. Supp. 89.

As to the Railroad Company, the complaint rests upon a charge of conspiracy between the Road and the Brotherhood to defraud complainant of his seniority rights. Of course, the charge of conspiracy or fraud in general terms [fol. 158] is insufficient. Facts must be alleged which would justify the legal conclusion of an unlawful conspiracy. "The illegal purpose or means, which the conspirators meant to accomplish or to resort to, must be described accurately, for unless the object is illegal, or the means agreed upon illegal, there is no actionable wrong." *National Park Bank v. L. & N. R. R.* 199 Ala. 192, 74 So. 69.

When the facts alleged are considered, we think it clear enough no unlawful conspiracy is charged against the Railroad. As we have previously observed, the Road was under statutory duty, mandatory in character, to deal with the representative of the craft. True, the complainant, as a Negro fireman, is ineligible to membership in the defendant Brotherhood, but as observed by the New Jersey Court in *Cameron v. International Alliance*, *supra*:

> "Trade union membership, like other contractual relationships, is purely voluntary on both sides. Such organizations come into being for purposes mutually agreed upon. The cohesive force is the common interest. Their right to prescribe qualifications for membership, and to make rules and regulations for the transaction of their lawful business, is not open to question. They may impose such requirements for admission and such formalities of election as may be deemed fit and proper; they may restrict membership to the original promoters, or limit the number to be

thereafter admitted; the power of such a body to make its membership exclusive is incident to its character. * * * Enforced admission to membership is manifestly contrary to the scheme of such a society. No person has an abstract or absolute right to such membership."

This principle was likewise recognized by this Court in the recent case of *Chapman v. American Legion*, — Ala. —, 14 So. (2d) 225, 147 A. L. R. 585, in which latter citation many authorities are to be found in the note.

Like thought was expressed in the separate concurring opinion to be found in *Brotherhood of Railway & S. S. Clerks v. U. T. S. E. A.*, 137 F. (2d) 817, where it was said: "That the rules of the Brotherhood make Negroes ineligible to membership is not a matter which concerns us." Counsel for complainant place much stress upon this authority. That case involved "red caps" who were ineligible to membership in the Brotherhood, but who insisted that the Brotherhood should not be considered their representative, and that they were entitled to one of their own choosing. The Mediation Board, however, considering that they were represented by the Brotherhood, denied their application for separate representation. The United States Circuit Court of Appeals for the District of Columbia held, in effect, that the finding of the Mediation Board was errone- [fol. 159] ous as a matter of law, and the judgment of the District Court setting aside the order was affirmed.

As we gather from the opinion of the Court of Appeals, the Mediation Board had held that these employees were in fact merely a minority group of an established craft or class that did have representation. This opinion of the Court of Appeals was reversed by the Supreme Court of the United States without opinion. *Brotherhood of Railway etc. Employees v. United Transport Service Employees*, 88 L. Ed. 153. Perhaps the reversal was rested upon the principle held decisive in *Switchmen's Union v. National Mediation Board; General Committee, Brotherhood of Locomotive Engineers v. Missouri-Kansas-Texas Railroad Co.*; and *General Committee, Brotherhood of Locomotive Engineers v. Southern Pacific Co.*, *supra*, to the effect that the courts will decline to review the action of the Mediation Board in the matter of representation under the Railway Labor Act. However this may be, we think

clearly the reversal could also have been rested upon the theory, as outlined by the Mediation Board, that the "red caps" were already represented, and that the case merely presented a complaint on the part of a minority of the craft or class who were disappointed with the representative the majority had selected.

In any event, the instant case is much stronger for the defendants. Here there is no question of representation. The bill discloses upon its face that the Brotherhood has been delegated as representative under the Railway Labor Act as representative of the craft or class to which complainant belongs, and has been so acting and so recognized as the representative for many years.

In *Washington Termianl Co. v. Boswell*, 124 F. (2d) 235, is found a comprehensive review of the Railway Labor Act. It was designed, as stated in the opinion, "not to outlaw the right to strike, but merely to prevent the necessity for its exercise." And in *Virginia Railway v. Federation, supra*, the Court noted the fact that in this Act more is involved than the settlement of a private controversy without appreciable consequences to the public. "The peaceable settlement of labor controversies, especially where they may seriously impair the ability of an interstate rail carrier to perform its service to the public, is a matter of public concern."

[fol. 160] Considering, therefore, the situation as thus presented to the Railroad, the question at once occurs to a practical mind: What step was the Road to take? The representative of the craft, the Brotherhood, had made a request for a modification of the existing contract concerning seniority rights. Was it the duty of the Road to combat the representative and enter into an argument as to its resultant effect upon employees who were in the minority? The operation of a railroad presents many complex problems. Among the most serious are those involving its relationship with its employees, as well as with the public at large, and their responsibilities as to the safety of the travelling public. It requires not only skill in management and in the actual operation by the employees, but it requires cooperation among the employees, as well as with the management. There was nothing hasty in the acceptance of the Brotherhood's proposal. Nearly a year had passed from the time the request was made until its final acceptance.

The Railway Labor Act was careful to preserve to the individual employee the right of conference with the management, either individually or through a local representative of the employees. Sec. 152, Title 45 U. S. C. A., supra. There was no requirement, either in the Act or in the rules or regulations of the Brotherhood, which called for notice to the individual employee of a change in the contract.

The defendant Road had all these complex matters for consideration. As we have previously noted, the bill discloses a traditional policy of the railroads throughout the country to promote to the position of engineer white firemen only. This means, of course, that such course had been considered by the management as wise and proper throughout the history of the railroads in America. Complainant has long been in the service, and knew of this unbroken custom. He therefore knew that he would not be eligible for promotion to the position of engineer. So uniform a custom, therefore, recognized in the practical construction of his contract of employment, must be considered as a part thereof. *City of Greenville v. Greenville Water Works*, 125 Ala. 625, 27 So. 764; *Bixby-Thiesen Co. v. Evans*, 174 Ala. 571, 57 So. 39; *Birmingham Water Works Co. v. Hernandez*, 196 Ala. 438, 71 So. 443; *Mitau v. Roddan*, 149 Cal. 1.

[fol. 161] It is, of course, necessary that the engineer be promoted from his position of fireman; but practical considerations also require he likewise have had, as fireman, experience over the run to which he is likely to be promoted to engineer. This modified contract of which complainant complains was in harmony with the Railroad's policy, and lends support to its theory of operating successfully a great transportation system. As was said in *Washington Terminal Co. v. Boswell*, supra, the railroad still "has the power of management." Freedom of individual enterprise is regarded as one of the cornerstones of our form of government. This freedom, under the police power, is subject to many restrictions for the public good, recognized in innumerable decisions following legislation to that end. Such freedom of enterprise is restricted as to the railroads in instances too numerous to mention, among them the Railway Labor Act. But no act of Congress has yet been enacted which interferes with the management of the Road insofar as the question of the selection of its individual employees is concerned. If the Road considers it wiser to

continue the policy of having only white engineers, there is no more a law standing in the way of the exercise of this freedom of choice than there is in the choice of the Brotherhood of its membership. And it is clear enough the courts have no power to declare otherwise or to dictate a different policy.

In *Plessy v. Ferguson*, 163 U. S. 537, many observations were made concerning laws relating to the separation of races. That it is a question of much delicacy, history teaches and all men know. In the Plessy case, supra, the Court said:

> "Laws permitting, and even requiring, their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power. The most common instance of this is connected with the establishment of separate schools for white and colored children, which has been held to be a valid exercise of the legislative power even by courts of states where the political rights of the colored race have been longest and most earnestly enforced. * * * In determining the question of reasonableness it is at liberty to act with reference to the established usages, [fol. 162] customs and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and good order. * * *
>
> Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation."

Considering, therefore, the averments of fact, the bill merely discloses that the Road has signed an agreement with the Brotherhood, the representative of the entire craft, which in fact is in harmony with its traditional policy. The Railroad, in entering into this agreement, did nothing illegal and pursued no illegal means. As a consequence, it was guilty of no actionable wrong. *National Park Bank v. L. & N. R. R.*, *supra*. This conclusion makes it clear the complainant is entitled to no specific performance of the con-

tract of 1929 by mandatory injunction against the agreement of 1941.

The same rule of law concerning the necessity for charging facts to show a conspiracy is applicable to the charge of fraud, as against the Brotherhood and the individual defendants. Fraud is never presumed, and the facts upon which the charge is based must be clearly stated. *Winn v. Winn*, 242 Ala 324, 6 So. (2d) 401; *Birmingham Trust & Savings Co. v. Shelton*, 231 Ala. 62, 163 So. 593; *Broom v. Douglas*, 175 Ala. 268, 57 So. 860; 24 Am. Jur. p. 88.

Certainly the management of the Railroad has as much right to take into consideration this delicate problem as does the law-making body of any state in passing laws looking to the peace and good order of society. The very object of the Railway Labor Act was to provide for the public safety an uninterrupted transportation system.

We think a consideration of the facts alleged as to the Brotherhood leads to the same conclusion we have arrived at concerning the defendant Railroad. In substance and effect complainant's case is rested against the Brotherhood upon the theory that it was under a duty to give the minority employees, non-members of the Brotherhood, notice of any action to be taken which would in any manner detrimentally [fol. 163] affect their seniority rights. We have expressed our view that no such duty rested upon it. So considered, therefore, the charge of fraud amounts largely merely to an accusation that the Brotherhood is looking largely to the interests of its own membership to the detriment of complainant. Even should this be conceded, yet at the same time the action of the Brotherhood looks to the welfare of the majority of the craft, and has the same basic foundation that underlies the Road management. It looks to a compliance with the traditional custom of the Road to have only white engineers. There is no charge of bad faith or malice against the complainant or any of his class. 117 A. L. R. 823. The charge is, that by entering into this latter agreement, which, as we have observed, is in line with the policy of the Railroad management, the Brotherhood has fraudulently disrupted complainant's seniority rights. True, complainant in this particular case does not seek to be placed in the promotable class; that is, he does not seek to be declared in this suit eligible for the position of engineer. But our previous discussion discloses that a recognition of the principles for which he contends here will ulti-

mately lead to that end. If the Brotherhood is his confidential agent, and must look to his interest, it must look to his promotion in the final analysis. Complainant is in the minority group of his craft, and if he suffers any hardship, it is due to the fact of control of the majority, which can in no event be considered as a fraud, either in law or fact.

There are numerous instances where individual hardships have been suffered for the good of the whole. The New York Court in *O'Keefe v. Local 463*, 117 A. L. R. 817, speaking to this question, said:

> "The question presented upon the appeal is whether under its constitution and by-laws the union has power and right to take action reasonably calculated to advance its objects, even through such action involves interference with the employment of a member who has committed no wrong and against whom no charges have been preferred. This Court has frequently sustained the right of labor unions to interfere by lawful means between an employer and his employees who are not members of the union where the purpose of such interference is solely to advance the interest of [fol. 164] the members of the union. We have not been oblivious of the consequent hardship imposed, at times, upon individual employers or employees, but for hardship to the individual resulting from action reasonably calculated to achieve a lawful end by lawful means the Court can give no redress. * * * The objects sought by a union and the "unity of action" to achieve them cannot be attained without some harm to the individual."

Another illustration is to be found in the Massachusetts case of *Minasian* v. *Osborne*, 37 L. R. A. NS 179, where a son lost employment for the reason that he had his father as a helper. And another, involving the loss of employment by a married woman, is found stated in *Hartley* v. *Brotherhood of Ry. & S.S. Clerks*, supra. The Court observed in this latter case: "The Brotherhood had the power by agreement with the Railroad to create the seniority rights of plaintiff, and it likewise by the same method had the power to modify or destroy these rights in the interest of all the members." Congress has made no effort to control the matter of seniority rights. It has left that to contract between the parties. That contract has been entered into which detrimentally

affects complainant's seniority rights, but it was made by his representative, and it is in conformity with the uniform and traditional practice of the Road. It is a lawful contract entered into a lawful manner, and the facts alleged fail to show any conduct on the part of the Brotherhood that creates in complainant an actionable wrong.

In the discussion of this case we have left to one side many questions presented by the demurrer and argued by counsel for defendants, some of which may give rise to serious consideration.

The Shaup case, supra, involved no attempt to charge fraud or bad faith, and the weight of authority decidedly supports the view there taken. *Grand Int. Brotherhood of Locomotive Engineers* v. *Mills* 31 Pac. (2d) 971. There are numerous authorities, however, tending to support the view that a court of equity will lend its aid in protection of seniority rights which are fraudulently and illegally interfered with. 142 A. L. R. 1067. This question, as well as all [fol. 165] others, becomes one of secondary consideration in view of the conclusion reached that the bill states no cause of action in any form. We, therefore, prefer to rest our decision upon the fundamental meritorious question sought to be presented.

We are at the conclusion, therefore, that the demurrer was properly sustained and the decree appealed from is due to be affirmed. It is so ordered.

Affirmed.

All the Justices concur.

[fol. 166] [File endorsement omitted]

IN SUPREME COURT OF ALABAMA

[Title omitted]

MOTION FOR STAY OF EXECUTION—Filed Jan. 29, 1944

To the Honorable Chief Justice and Associate Justices of the Supreme Court of Alabama:

Comes the appellant, Bester William Steele, by his attorney with consent of the Court first had and obtained moves the Court to grant an extension of time of sixty days

before the execution of the Writ of Fieri Facias in the above styled case, and for grounds of said motion sets down and assigns the following:

1. That additional time is needed to enable Petitioner to apply for, to obtain and perfect a Writ of Certiorari in the Supreme Court of the United States.

Signed: Arthur D. Shores, Attorney for the Appelant.

I hereby certify that I have this day mailed a copy of the foregoing motion to the Honorable James Simpson, Solicitor for Brotherhood of Locomotive Firemen and Enginemen and W. H. Thomas; and White Gibson, Solicitor for the Louisville and Nashville Railroad, whose proper Post Office addresses are, Birmingham, Alabama, this 24th day of January, 1944.

Signed: Arthur D. Shores, Attorney for the Appellant.

[fol. 167] IN THE SUPREME COURT OF ALABAMA

[Title omitted]

ORDER STAYING EXECUTION—Jan. 29, 1944

Upon consideration of the petition of Appellant, Bester William Steele, this day filed, it is ordered that the petition be and the same is hereby granted, and the execution of the judgment rendered by this Court on January 13th, 1944, in the above styled cause be and the same is hereby stayed for 60 days, to enable petitioner to apply for, obtain and perfect a Writ of Certiorari in the Supreme Court of the United States.

It is further ordered, if the Petition for the Writ of Certiorari is filed in the Supreme Court of the United States within the said 60 days, that said stay remain in force and effect until said cause is disposed of by the Supreme Court of the United States.

[fol. 168] COMPLAINANT'S EXHIBIT "AA"

Agreement Between the Louisville & Nashville Railroad and Its Locomotive Firemen and Hostlers in Accord with Mediation Agreement, Effective March 31, 1927, Arbitration Award, Effective May 1, 1927, and Supplementary Agreement, Effective March 1, 1929

Issued March 1, 1929

[fol. 168-1] Article 25

Assignments and Pool Service, Regulating Mileage, Etc.

1. When assigned to regular runs they will not be required to perform other service, that they do not stand to protect, except in cases of emergency, and when so used, [fol. 168-2] will be notified, as far as possible, in time to get proper rest.

2. When assigned to regular runs and held off to perform special service they will be paid not less than the amount they would have earned had they remained on their regular runs. (This not to apply to men in freight service, designated to do extra passenger work.)

3. When on regularly assigned runs they will fill their runs regardless of the engine used. This to apply to cases of changing or cutting out engines on line of road unless special instructions are issued to the contrary.

4. Those assigned to first pool will handle the unassigned freight service and fill vacancies in fast freight and passenger service, as provided for in Sections 17, 18 and 19 of Article 26, and such other work as may be designated.

5(a). When not assigned to regular runs they will be run first in first out in class of service assigned. Under the first in first out rule, men in the same class of service will take their turns out in accordance with their arrival at the terminal yard board as shown on the roundhouse register.

(b) When a man used in yard service is relieved after a man in road service passes the yard limit board, but before he registers in at the roundhouse, or where both register in at the same time, the man used in yard service will

stand first out as between them. This applies also to firemen relieved from hostling service.

6. In case of doubleheading, men assigned to regular runs will be used on head engine; where doubleheading in pool service, the man standing first out will be used on head engine. When engines are cut out between terminals, the man on the head engine will be considered in charge of the train and remain on the head engine regardless of engines [fol. 168-3] used. When engines are cut in between terminals, the man in charge of the train will take the head engine.

7. Men holding permanent assignments which they secured by seniority wishing to voluntarily surrender same will be required to give ten (10) days notice, remaining on run or job, unless they lay off, until rebulletined.

8. The time set for departure of the train upon which men are to be used in service, or upon which they are to deadhead, will govern as to how they will be run out, (preparatory time not to be taken into consideration).

When two or more men in the same class of service are to be used, the following will govern, subject to Section 8:

8 (a). When two men are called to depart at the same time, one for a road trip; the other for a yard engine, the man first out will be used for the road trip, and the man second out for the yard engine.

(b) When two men are called to depart at the same time, one in passenger service, the other in freight service, the man first out will be used in passenger service.

(c) When two men are called to depart in road service at the same time, on different trains, one to perform service and the other to deadhead, the man first out will be used to deadhead and the man second out will be used on the service trip.

(d) When two men are called for the same train, one to handle the train, the other to deadhead, the man first out will handle the train, the other deadhead.

(e) When two or more men in the same class of service are to deadhead on the same train, they will be handled in the following order:

1. To an intermediate point for return service to the home terminal:

[fol. 168-4] Note—Where more than one man is deadheaded for such service, the man first out will be deadheaded to the nearest point; the man second out to the next nearest point, and so on. If deadheaded to the same point, they will take their turns out in the order they stood when called.

2. To the away-from-home terminal, or for service to the away-from-home terminal:

Note—When two or more men start deadheading on the same train en route to the opposite terminal, but one or more of them are cut out at an intermediate point to perform service to the opposite terminal, the man last out will be cut out at the first point; the man next out at the second point, and so on.

3. For service at, or between intermediate points:

Note—Where more than one man is deadheaded for such service, the man first out will be deadheaded to the nearest point, the man second out to the next nearest point, and so on. If deadheaded to the same point they will take their turns out in the order they stood when called. Should they go on duty at the same time, the man who stood first out will have the preference of runs.

4. When one man is to be deadheaded from the away-from-home terminal to the home terminal, and another to an intermediate point, the man first out will be deadheaded to the home terminal. If more than one men is to be deadheaded to intermediate points, the man first out will be deadheaded to the nearest point, the man second out to the next nearest point, and so on.

(f) When two or more men are doubleheaded or deadheaded through to the opposite terminal, they will take their turns out in the same position that they were in when called.

[fol. 168-5] (g) When a man deadheads in from an intermediate point, the man pulling the train will be considered first out.

(h) When two or more men deadhead in from an intermediate point on the same train, they will take their turns

out as per Article 25, Section 5, of the General Agreement, as between themselves, according to the time relieved from the last service performed, but behind men who may have deadheaded through from the initial terminal on the same train, this information to be shown on register.

9. (a) When men assigned to the same class of service are doubleheaded on the same train and one engine or man is to be cut out at an intermediate point, the man who stood second out will be cut out and the man who was first out will handle the train through, as the case may be, to the terminal regardless of engine used.

(b) When men on runs to which they are assigned, or in the class of service they stand to protect, have engine failures on line of road and a relief engine is sent in charge of a second pool man, the man in charge of the run will change engines and complete the trip, the second pool man taking charge of the disabled engine; when for any cause, a first pool man is used to take a relief engine to take the place of a disabled engine of a train in charge of another first pool man, they will not change engines but the man in charge of the relief engine will complete the trip and the man in charge of the disabled engine will remain with his engine.

10. Firemen will be assigned to regular jobs in yard service by bulletin regardless of engine used.

11. When bulletining yard jobs they will show, as far as possible, the nature of the work, district and number of days per week to be worked, and will be used, so far as practicable, in the district and on the work to which assigned.

[fol. 168-6] 12. When assigned to jobs bulletined to work a certain number of days per week and annulled for four successive days or four days in the aggregate in a thirty-day period, or when engines are worked as much as four days more than provided for during a thirty-day period, they will be considered as new jobs and rebulletined accordingly.

13. Jobs to which one or more men are assigned will only be rebulletined when the time for going to work or being relieved has been changed as much as two hours as

long as worked in the same district or terminal. Where the point for going on duty or being relieved is changed as much as one-half mile, such jobs will be rebulletined. When extra jobs are worked as much as six consecutive days, they will be considered regular assignments and be bulletined accordingly.

14. Where new jobs are created, or a second crew assigned to a job to which only one crew has been assigned, such new job or second shift will be bulletined.

15. Men displaced on account of their jobs being rebulletined, under the above rules, will have the right of a displaced man to claim any job the seniority rule entitles them to.

16. (a) Those assigned to second pool will be used to fill vacancies of first pool men, assigned runs not otherwise provided for and such other work as may be designated.

(b) When a first pool man is used to fill a vacancy in assigned passenger service, the vacancy should be left in first pool board, to be filled by second pool man.

(c) When first pool men are used to doublehead regular passenger trains or to handle extra passenger trains, including extra sections, officers specials, troop trains, etc., this will be considered as regular first pool work and there will be no vacancies left on the board.

[fol. 168-7] 17. When firemen are needed for extra service operating out of points where pool or extra crews are not carried, men will be deadheaded from terminal where second pool or extra boards are maintained.

18. (a) When a first pool man is laying off and reports for duty, he will take his turn, if on the board. If his turn is out, he will take the turn of the man representing him on arrival if within 36 hours from the time he departed. If the turn does not arrive within 36 hours he may take the register at that time.

(b) Men who report for duty and lay off again before performing any service on their runs or jobs will not be considered as having reported for duty. The man who is filling the vacancy and entitled to hold same under the Agreement will be continued in the vacancy just the same as though the regular man had not reported, unless he is

called for other service in the meantime, in which case the vacancy will be refilled as if a new vacancy. (This, however, would not break the continuity of the vacancy.)

(c) First pool men who have been filling vacancies in other service, returning after being held out of service to attend court or investigations, or deadheading in under pay or by necessity, etc., will take their turns according to the register.

For rule for handling of pool crews held out of service at away-from-home terminals to attend investigations, see Article 31.

19. Those assigned to second pool, whether reporting for work after being off for any cause or coming in off a run, except where filling vacancies of ten days or more, will take their turn according to the register.

20. When a first pool man is used for service that a second pool man stands to protect on account of there being no second pool man available, it will not be considered as creating a vacancy in the first pool for forty-eight hours, and second pool man will not, therefore, be used to fill the va- [fol. 168-8] cancy until after the expiration of forty-eight hours. Under such circumstances when a first pool man is used to protect second pool work on work trains or outlying runs he will be relieved at his request by second pool man as soon as possible, with the understanding that no extra or additional expense for deadheading will be incurred under such circumstances.

21. When a vacancy becomes first out in the first pool, and there is no second pool man to fill it at the time the train is ordered, the vacancy will be left first out until there is an available man to fill it, first pool men running around same.

22. When conditions do not justify the operation of first and second pool, the second pool may be abolished by mutual agreement between the division officers and the local chairman.

23. When practicable they will not be required to make more than one turn-around trip out of the away-from-home terminal without being run through to their home terminal.

24. (a) In regular and extra passenger service a sufficient number of engineers and firemen will be assigned to keep the average mileage, or equivalent thereof, between 4,000 and 4,800 miles per month.

(b) In assigned pool or chain gang freight, or other service paying freight rates, a sufficient number of engineers and firemen will be assigned to keep the average mileage, or equivalent thereof, between 3,200 and 3,800 miles per month.

(c) On road extra lists a sufficient number of engineers and firemen will be maintained to keep the average mileage, or equivalent thereof, between 2,600 and 3,800 miles per month; provided that when men are cut off the working lists and it is shown that those on the extra lists are averaging the equivalent of 3,100 miles per month, men will be [fol. 168-9] returned to the extra lists if the addition will not reduce the average mileage, or equivalent thereof, below 2,600 miles per month.

(d) In assigned yard service, regulation will be made by requiring each regularly assigned man to lay off when he has earned the equivalent of 35 days per month.

(e) In extra yard service, a sufficient number of engineers and firemen will be maintained to keep the average earnings between 26 and 35 days per month; provided, when men are cut off the lists and it is shown that men are averaging the equivalent of 31 days per month, men will be returned to service, if the addition will not reduce the average earnings below 26 days per month.

(f) Local Chairmen of both organizations will be furnished record of the earnings of engineers and firemen in the first and second pools and yard extra lists each fifteen (15) day period, and of regularly assigned engineers and firemen each thirty (30) day period. Regulations of lists will be made according to those periods except where local agreements provide otherwise for either engineers or firemen, in which event record of earnings will be furnished for the period agreed upon.

(g) Should an engineer or fireman make the maximum mileage as prescribed in this Article, he will not be permitted to make an additional trip during that month. If,

however, any engineer or fireman exceeds his maximum miles or days, as stipulated in the preceding paragraphs, in any month, such excess will be charged to his mileage or days in the following month.

Note—Engineers or firemen used in combination service will be permitted to make the equivalent of 3,800 miles in freight service. This shall not be construed to modify the rule regulating mileage of men in extra service as covered by Section (c).

[fol. 168-10] (h) In regulating the working lists in the respective classes of service, each list will be handled separately. In the regulation of mileage, neither the minimum nor the maximum is guaranteed.

(i) When, from any cause, it becomes necessary to reduce the number of engineers on the engineers' working list on any seniority district, those taken off, may, if they so elect, displace any fireman their junior on that seniority district under the following conditions: Reductions when made shall be in reverse order of seniority. No reductions will be made so long as those in extra passenger service are averaging the equivalent of 4,000 miles per month; in pool, chain gang or other unassigned service paying freight rates, are averaging the equivalent of 3,200 miles per month; on road extra lists are averaging the equivalent of 2,600 miles per month, and on the yard extra list are averaging the equivalent of 26 days per month.

(j) When hired engineers or firemen are laid off on account of reductions in service, they will retain all seniority rights, provided they return to actual service within thirty (30) days from the date their service was required.

Article 26

Seniority and Filling Vacancies:

1. Seniority will be established in the following manner: The oldest fireman in road service will have the preference of runs and promotion on the seniority territory to which assigned, when competent and worthy, in accordance with the following rules: These rules apply to firemen in yard service as between themselves except at points where road seniority and yard seniority is interchangeable.

2. Firemen shall rank on the firemen's roster from the date of their first service as firemen when called for such [fol. 168-11] service except as provided for in Section 12, and when qualified shall be promoted to position as engineers in accordance with the following rules:

3. Firemen shall be examined for promotion according to seniority on the firemen's roster and those passing the required examination shall be given certificates of qualification and when promoted shall hold their same relative standing in the service to which assigned.

4. If for any reason the senior eligible fireman or engineer to be hired is not available, and a junior qualified fireman is promoted and used in actual service out of his turn, whatever standing the junior fireman so used, establishes, shall go to the credit of the senior eligible fireman or engineers to be hired, provided the engineer to be hired is available and qualifies within 30 days. As soon as the senior fireman or engineer to be hired is available, as provided herein, he shall displace the junior fireman who shall drop back into whatever place he would have held had the senior fireman to be promoted or the engineer to be hired been available and the junior fireman not used. (Qualifications as referred to herein is not intended to include learning of road or signals.)

5. As soon as a fireman is promoted, he will be notified in writing by the proper official of the Railroad of the date of his promotion, and unless he files a written protest within 60 days against such date, he cannot thereafter have it changed. When a date of promotion has been established in accordance with regulations, such date shall be posted, and if not challenged in writing within 60 days after such posting, no protest against such date shall afterwards be heard.

6. No fireman shall be deprived of his rights to examination, nor to promotion in accordance with his relative standing on the fireman's roster, because of any failure to take his examination by reason of the requirements of the Railroad's service, by sickness or by other proper leave of [fol. 168-12] absence; provided, that upon his return he shall immediately be called and required to take examination and accept proper assignment.

7. The posting of notice of seniority rank, as per Section 5 shall be done within ten days following the date of promotion and such notice shall be posted on every bulletin board of the seniority district on which the man holds rank, and both the Local and General Chairmen of the Engineers and Firemen furnished a copy.

8. Firemen having successfully passed qualifying examination shall be eligible as engineers. Promotion and establishment of a date of seniority as engineer, as provided herein, shall date from the first service as engineer, when called for such service, provided there are no demoted engineers back firing. No demoted engineer will be permitted to hold a run as fireman on any seniority district while a junior engineer is working on the engineer's extra list, or holding a regular assignment as engineer on such seniority district.

Note—Where promotion is to road service only, promotion and establishment of seniority date as road engineer will obtain.

9. On seniority district where firemen are required to fire less than three years, all engineers will be hired;

If required to fire three and less than four years, one promoted to one hired;

If required to fire four and less than five years, two promoted to one hired;

If required to fire five and less than six years, three promoted to one hired;

If required to fire six and less than seven years, four promoted to one hired;

If required to fire seven and less than eight years, five promoted to one hired.

[fol. 168-13] On seniority districts where firemen are required to fire eight years or more, all engineers will be promoted.

The foregoing will not prevent committees from having discharged engineers re-employed or reinstated on their former seniority districts at any time, and the seniority standing will be determined by the Management and the Committee representing the engineers.

10. If the engineer to be hired is not available when needed and the senior qualified fireman is promoted, the date of seniority thus established shall fix the standing of

the hired engineer, who, if available and qualified within 30 days from date senior qualified fireman is promoted, will rank immediately ahead of the promoted fireman. The promoted fireman will retain his date of seniority as engineer and will be counted in proportion of promotion.

11. In case an engineer is hired and used in actual service, when, under requirements of Section 9, a fireman, or firemen, should have been promoted, the date of seniority thus established shall fix the standing of the senior qualified fireman or firemen due to be promoted, provided he, or they, are eligible and qualify within 30 days, who shall rank immediately ahead of the hired engineer on the engineer's seniority list. The hired engineer will retain his date of seniority and be counted in proportion of engineers to be hired.

12. The seniority date of the hired or transferred engineer shall be the date of his first service as engineer, except as provided in Sections 4, 10 and 11 of this Article. Engineers hired, or permanently transferred from one seniority district to another shall be given a date of seniority as firemen corresponding with their date as engineers.

13. Firemen, except those borrowed for temporary service, will be considered permanently assigned to the seniority district where employed on December 5, 1921. Firemen transferred from one seniority district to another forfeit [fol. 168-14] all seniority on the district transferred from and assume seniority on the district transferred to from the date of their first service after being transferred.

Firemen transferred from their regular seniority district to another for temporary service, who, while on such temporary assignment, file application for permanent transfer, with the Master Mechanic having jurisdiction over that district, within sixty days from the date of their first trip after having been temporarily transferred, will, if transfer is authorized, establish seniority on the new district as of the date of their first trip thereon and forfeit all seniority on the district from which transferred.

If, under the foregoing circumstances, application for permanent transfer is not filed within the specified limit period, however, is filed thereafter, seniority on the new district will be established as of the date application is filed

with the Master Mechanic provided the transfer is authorized.

Engineers transferred for temporary service will not be continued in service away from their regular seniority districts after a sufficient number of firemen, assigned to the seniority district where such engineers are being used, become available for promotion and qualified for position as engineer to relieve them.

Engineers transferred will be counted as hired men so far as the proportion of engineers to be hired to firemen promoted is concerned. Therefore, if an engineer is transferred for permanent service at the time when, under the requirements of Section 9, Article 26, a fireman or firemen should have been promoted, he will establish a date of seniority of the senior qualified fireman or firemen due to be promoted who will rank immediately ahead of the transferred engineer.

14. Road seniority districts will be grouped with yard districts, as agreed upon and handled in the following manner: [fol. 168-15] 15. Road firemen's seniority will be established in yard service, effective September 1, 1919, in the yard district grouped with that road seniority district.

16. (a) Firemen employed in yard service previous to September 1, 1919, who are qualified, or may qualify for road service, will be given the preference of advancement to road service on the road seniority district grouped with the yard where they are employed, in preference to men employed since that date, and will assume seniority in road service from September 1, 1919, in the order of their relative standing in yard service, where they qualify as soon as given an opportunity to do so. Those who fail to make application for road service, or fail to qualify when given an opportunity to do so, including those who have become disqualified, employed or re-employed for yard service only, will be known as "Yard Fixtures," but this will not prevent them from making application thereafter for road service if they are able to meet the Railroad's requirements, in which case, they will, if able to qualify for road service, assume road seniority from the date they qualify for such service. Firemen employed for service after September 1, 1919, will be given seniority in both road and yard service from the date of their first service after employment.

Note—It is understood that fixtures in yard and hostling service shall not be displaced entirely out of the service by men holding road seniority.

(b) Firemen will not be employed or re-employed for yard service only, and hostlers will not be employed or re-employed for hostler service only, except by concurrence with the Committee, and then only in accordance with the provisions as hereafter outlined.

The above rules were revised as they now read on March 31, 1926. The following rules will govern firemen employed for yard service only and hostlers employed for hostler [fol. 168-16] service only between September 1, 1919, and March 31, 1926, or who have been thus employed by mutual concurrence since March 31, 1926.

(c) That in the reduction of forces, when a man with greater seniority is cut off, a fireman employed or re-employed for yard service only, or a hostler employed or re-employed for hostler service only since September 1, 1919, may be displaced by a senior man.

(d) That a fireman employed or re-employed for yard service only since September 1, 1919, thus displaced from a regular job at a point where no extra yard board is maintained, will be given preference over firemen on the road extra list in filling temporary vacancies in yard service until his seniority entitles him to a regular job, or in other words, an extra yard board would be established for him alone and he would be given preference in filling all vacancies of less than 30 days in the same manner as provided in Section 26, Article 26 of the Agreement.

(e) That a fireman employed or re-employed for yard service only since September 1, 1919, thus displaced from a regular job at a point where an extra yard board is maintained, will be placed on the extra yard board and take his turn with other men on that extra board until such time as his seniority entitles him to a regular job, provided his seniority as of the date he was actually employed entitles him to a place on the board, otherwise he will not be entitled to go on the extra board; further, should his seniority entitle him to a place on the extra board and later it becomes necessary to cut the board, seniority will govern in making reductions.

Note—Sections (d) and (e) apply also to hostlers employed or re-employed for hostler service only since September 1, 1919, and who have been thus displaced, that is, the same arrangement will apply as to placing them on extra boards and they will be given preference in filling vacancies of less than 30 days as hostlers as provided in Section 35, Article 26.

[fol. 168-17] (f) That the revision of the rules does not affect the status of men holding seniority as of September 1, 1919, who have been reinstated with restrictions that they are to be used in yard or hostler service only, or who may hereafter be reinstated under the same conditions.

17. Temporary vacancies in passenger service of less than ten days, will be filled by firemen standing first out in the class of service designated (on their respective divisions) to do the extra passenger work or until the regular man reports, if earlier. But when it is known the vacancy will be for ten days or longer, or if it has been for ten days, the oldest firemen (in point of seniority) in the class of service designated to do the extra passenger work may be assigned to the run and hold it until the regular man reports for duty or until it is declared vacant, when it will be advertised in the usual manner.

18. All vacancies in through passenger service will be filled by fast freight firemen (where assigned fast freight service is maintained). Vacancies in local passenger service and all extra passenger runs, including additional sections, doubleheading, troop trains, etc., will be filled by first pool men.

19. When there is a vacancy of less than ten days in fast freight service, the fireman standing first out in the first pool will fill it for one round trip, taking his turn according to register on his return. When it is known that a vacancy will be for as much as ten days, or when a vacancy has existed for ten days, the oldest man in the first pool may be assigned to the vacancy and hold same until the regular man reports, or until the run is declared vacant when it will be advertised and filled in the usual manner.

Note (a)—"When it is known that a vacancy will be for as much as ten days" refers to vacancies where it is known in advance that the vacancy will be for ten days, such as

[fol. 168-18] vacancies pending assignment by bulletin, vacancies caused by men requesting to be absent ten days or longer, etc. When a man does not specify that he desires to be absent as much as ten days it does not constitute a ten-day vacancy until after ten days elapse.

When it is known that a vacancy will be for ten days, or when it has existed for ten days, the senior man on the working list at the home terminal in the class of service designated to protect the vacancy will be notified. Should he not be within reach, or should he decline it, the senior man making application will be assigned, subject to being displaced by an older man. In the event the senior man at the home terminal does not claim the vacancy, a memorandum will be placed on bulletin board at roundhouse at the division home terminal, calling attention to it unless some other arrangement of this kind is already in effect.

The man entitled to fill the vacancy may be assigned to it at any time during the duration of the vacancy, regardless of the number of days which have elapsed since the vacancy occurred.

Should the oldest man entitled to a vacancy decline it, he is not privileged to displace a junior man who may be assigned to the vacancy.

Note (b)—Second pool men will be handled in the same manner with respect to vacancies in service which they stand to protect.

20 (a) When it is known that any assigned run will be vacant for 30 days, or when it has been vacant 25 days, it will be posted for a period of five days and the oldest fireman making application for same will be placed on the run and hold it until the regular man reports, or the run is declared permanently vacant, when it will be bulletined in the usual manner. All permanent vacancies or new runs covered by the agreement will be bulletined for a period of [fol. 168-19] ten days, and when practicable, such bulletins posted ten days prior to the date assignment is to be made.

Note—Successful applicants for runs which have been bulletined will be relieved from the run they are holding as soon as they become available after new assignment is made, and it is practicable to relieve them, providing that the service bid in has been inaugurated.

(b) Firemen off on leave of absence when runs are bulletined will be entitled to make application for such runs within five days after reporting for duty. Where more than one run in a pool of runs working first in, first out, are advertised during their absence, they can displace only the junior man on the runs which were bulletined.

(c) When it is known in advance that a work train will be needed for as many as ten days, or when a work train has been in service for as many as ten days, it will be considered as a temporary vacancy and advertised for a period of five days, and the oldest fireman making application for same will be placed on the run.

When a work train has been on for a period of 80 days, it will be re-bulletined for ten days as a permanent vacancy.

Note—It is understood that should a man give up a temporary vacancy on a work train, the same conditions apply as apply in connection with other temporary vacancies under Section 20 (a) of this article. Further, that a man holding a temporary vacancy on a work train will remain on it pending its being re-bulletined as a permanent vacancy.

(d) All bulleting will expire at 12:00 o'clock noon, except on Sundays and Holidays.

(e) Men working at outlying points who do not have access to bulletin boards will be furnished with a copy of all bulletins.

[fol. 168-20] 21. All vacancies caused by reason of filling vacancies of ten days or more on other runs or in other service will be considered as stated vacancies, of ten days or more, and handled as such. Firemen filling vacancies of ten days or more will be considered bona fide men in that class of service.

22. When any run is changed to the extent that it is operated out of different terminals, the mileage lengthened or shortened to the extent of twenty miles per day, or the schedule compensation on runs paid under Article 3, Section (a), changed to the equivalent of twenty miles per day, the arriving or departing time changed to the extent of three hours, or when a run is changed to operate six days per week instead of seven, or vice versa, it will be considered as a

new run and bulletined as such. When a regular run is annulled as much as five days consecutively, or ten days in the aggregate, within a thirty-day period, the man holding such run may, if he so elects, claim any other run that the seniority rule will entitle him to, but should he claim another assigned run, he will forfeit his rights to the run he formerly held, which will be re-bulletined when re-established.

23. In case a run is temporarily annulled the man holding such a run may, if he so elects, work in the pool or extra service for a period of not to exceed 30 days without forfeiting his right to such run, but should he displace another assigned man, or should such run not be re-established within 30 days, he must then assert his claim to such run as he may be entitled, and the run he formerly held will be re-bulletined if re-established.

24. Men displaced from runs to which they were assigned by seniority will have the privilege of claiming any run held by a younger man. Displaced men exercising their seniority rights to a pool of runs must displace the youngest regularly assigned man in the pool or the man representing him.

[fol. 168-21] Note—When claiming first or second pool, they will take the register and the junior man will be taken out of the board. If the junior man is on line of road, he will be taken out of the board on his return to the terminal.

Note—This section does not apply to the Birmingham Mineral, where such questions will be decided on the merits of each individual case, between the Firemen's Committee and the Local Officials.

25. When a run is changed to the extent that it is considered a new run, requiring it to be re-bulletined, the man holding such run will have the privilege, if he so elects, of remaining on it until the expiration of the bulletin, or of claiming any other run that is vacant and bulletined at that time until assignment is made unless such run is claimed by an older man who stands to protect such service, without forfeiting his right as a displaced man. This rule will also apply to men displaced on account of their runs being taken off or claimed by older displaced men.

Note—Men will only be permitted to fill one bulletined vacancy under this rule, except that if displaced from such

a vacancy before expiration of the bulletin, they will be privileged to claim one other.

26 (a) Where extra boards are maintained vacancies on yard engines or extra engines of less than ten days will be filled by the men standing first out on the extra board from day to day. Vacancies of ten days or more may be filled by the oldest extra man for a period of thirty days, or until the regular man reports, if earlier, except that men assigned to second shift will be entitled to claim vacancies of ten days or more on first shift, and men assigned to third shift will be entitled to claim such vacancies on either first or second shift, except that they will not be permitted to displace a senior man who may be filling or claims the vacancy.

[fol. 168-22] (b) At points where no extra board is maintained, men assigned to second shift will be entitled to claim vacancies on yard engines of ten days or more and up to thirty days on first shift, and men assigned to third shift will be entitled to claim such vacancies on either first or second shift, provided they file written notice with the Mechanical Department representative at the outlying point before a man is ordered to protect the orignal vacancy.

27. Road firemen will not be used in yard service when there are available extra yard men for such service. When there are no available extra yard men, or at points where extra yard boards are not maintained, road extra men will be used in their turns to protect vacancies or extra yard service for one day or shift, and will be run according to the register. When necessary to use first pool men to protect vacancies in yard service or extra yard service on divisions where both a first and second pool is maintained, they will be used in their turn for one day or shift without forfeiting their turn on the road list, and will be run first out after having the required rest.

Note—The above rules apply to both yard and road service where applicable. Any questions pertaining to the handling of men, filling vacancies, etc., not covered by the foregoing rules, may be temporarily provided for by local arrangement between the local officials and Local Chairman, subject to approval of the general officials and General Chairman.

28. Except in case of emergency, firemen will not be used off the division to which they are assigned. When it is necessary to borrow them for temporary service from one division to another they will be returned to their home division before additional men are employed, promoted or transferred for service thereon.

29. Seniority lists will be revised and posted at terminals in January and July of each year, and a copy furnished the [fol. 168-23] Local and General Chairman of the Engineers' and Firemen's Committees. In no case will any change be made in the seniority standing of firemen and hostlers after it has stood without written protest for two years.

30. Engineers, firemen and hostlers appointed to official positions with the Louisville & Nashville Railroad or with the Brotherhood of Locomotive Firemen and Enginemen will not forfeit their seniority on their divisions.

31. Firemen will not be promoted to positions as engineers unless they have had at least three years' road experience. They will be required to fire at least three months in freight service within a reasonable length of time prior to the date of their promotion where they are promoted from other than main line freight service. Where they have been employed as firemen in main line freight service during the year prior to their promotion they will only be required to fire freight for one month.

32. Hostlers in the service prior to January 20, 1919, will hold priority rights and have the choice of such positions over hostlers thereafter assigned to such service, in order of their ages in the service as hostlers.

33. New positions created or permanent vacancies to be filled as hostlers, will be filled from the ranks of the firemen on that division or seniority district, the oldest qualified fireman to have the preference, except as hereinafter provided for. Assignments to be made by bulletin.

34. Exceptions may be made to Section 33 hereof by mutual agreement, in order to take care of disabled or disqualified engineers or firemen in positions of hostlers on the division where they were previously employed or held seniority rights; such exceptions to be made only after conference and mutual agreement between the officials and

[fols. 168-24–168-29] the committee representing the firemen and hostlers.

35. Temporary vacancies of less than ten days of hostlers will be filled by the fireman first out in the first pool who is qualified. Vacancies of ten days or more may be filled by the oldest first pool man who is qualified. Vacancies of 30 days or more will be bulletined for the oldest qualified fireman or hostler making application for same.

36. Wherever electric or other power is installed as a substitute for steam, or is now operated as a part of this system on any of the tracks operated or controlled by the railroad, the locomotive firemen shall have preference for positions as firemen or helpers on electric locomotives; but these rights shall not operate to displace any men holding such positions on the date of issuance of this agreement.

. . . . . .

[fol. 168-30] Article 31

Board of Inquiry and Discipline:

(a) Firemen, hostlers and helpers will not be demerited, discharged or otherwise disciplined without just cause.

(b) When it appears necessary to discipline a fireman or hostler by demerit or discharge, he will be notified in writing of the cause therefor, within ten days after knowledge of such cause comes to the officer or officers of the railroad having authority in such case, and within ten days after the notification there will be an investigation conducted by the proper officer or officers of the railroad, at which all evidence in the case will be submitted. The party so notified will be permitted to attend the investigation; to have such witnesses as he may desire to testify; to hear all evidence and to be represented by the Chairman of the Local Committee of his organization and or by fellow employes of his own selection.

(c) A proper record of the case will be made and certified to on the part of the railroad and on the part of the party subject to discipline in connection therewith, and the record will be made the basis for administering discipline, or of appeal to a higher officer.

[fol. 168-31] (d) Within ten days after the close of the investigation unless further time is mutually agreed upon,

the proper officer will notify the party in question of the decision and action. If the decision is unsatisfactory, the party in question has the right to appeal to the Director of Personnel, except that in cases pertaining exclusively to mechanical matters, the appeal will be made through the Superintendent of Machinery.

Note—It is understood that Section (e) and understandings reached in connection with this article, as covered by Assistant General Manager's letter of July 23, 1925, are subject to the same understanding being retained which has been in effect for many years past, that is, that the investigation will not be considered as closed until the papers have been approved by the Management.

(e) When an employe has been disciplined and desires to appeal, he or his representative will, upon application, be furnished with a copy of all statements taken at the investigation.

(f) If the discipline administered is not sustained, it will be cancelled, and the party in question will be paid for any time lost by him resulting from the investigation or action taken.

Note—This section applies only where a man is held out of the service or taken out of the service on account of his responsibility, and does not refer to loss of time on account of being held off of his run to attend investigation

(g) Firemen, hostlers and outside hostler helpers held out of the service to attend investigations of cases in which they are not held responsible, thereby losing a run or a day's work, will be paid as follows: Firemen assigned to regular runs will be paid for time lost; when in pooled, chain gang or extra service they will be paid $6.15 for each calendar day held; outside hostlers will be paid $6.27, inside [fol. 168-32] hostlers $5.63 and outside hostler helpers $5.07 for each calendar day so held.

Note—Payments under this section do not apply to men not losing any time, to men who are held responsible, or for deadheading to attend investigations.

Payments to men assigned to regular runs or jobs for time lost will include overtime they would have earned on their run or job.

Chain-gang or extra men held out of service to attend investigation will mark up at the foot of board after being released from the investigation, and will be paid the amount specified for each calendar day held off, a calendar day being from midnight to midnight. Examples—

A chain-gang fireman stands to go out at 9:00 A. M. He is held off to attend investigation at 10:00 A. M. Investigation is concluded at 3:00 P. M. and he is released. If not held responsible, he is entitled to the amount specified for one calendar day. Should the investigation not be concluded on that day and he is held and required to report on the following day, and relieved at 11:00 A. M., he is entitled to pay for two calendar days at the rate specified.

A chain-gang fireman stands to go out at 6:00 P. M.; is held off his run to attend investigation the following day and is released at 11:00 A. M. If not held responsible he is entitled to pay for two calendar days at the rate specified.

The above does not apply when they are held off their run while laying over at an away-from-home terminal, payment under this condition to be made on run around basis. (This refers to chain-gang crews.)

[fol. 168-33] ARTICLE 32

Right to make and interpret contracts:

(a) The right to make and interpret contracts, rules, rates and working conditions for locomotive firemen and hostlers is vested in the regularly constituted Committee of the Brotherhood of Locomotive Firemen and Enginemen and the General Officials of the Railroad.

Representation:

(b) The right of any engineer, fireman or hostler to have the regularly constituted Committee of his organization represent him in the handling of his grievances, under the recognized interpretation placed upon the schedule involved by the officials of the Railroad and the General Committee making the same, is conceded.

Construction and general rulings:

(c) General rulings or interpretations as to the proper construction of this Agreement will not be made except in

conference between the General Officials of the Railroad and the General Committee or General Chairman. When such rulings or interpretations are made, a copy of same will be furnished to the parties affected and the General Chairman.

(d) Interpretations of the United States Railroad Administration will apply to rules covered by Supplements Nos. 15 and 24, unless mutually agreed to the contrary.

(e) Local officials will not enter into local agreements with local committees or with any individual fireman or hostler in conflict with this Agreement, without the approval of the General Officials and General Chairman.

[fols. 168-34—168-40] Grievances:

(f) Local grievances and differences of opinion shall be taken up with the division officials by the duly authorized representatives of the men. Failing to be adjusted, they will be referred to the General Officials. When an appeal is to be taken to the General Officials, however, division officials will be advised to that effect, in writing, in order that their data may be sent to the General Officials for their use in considering the case.

(g) Local grievances shall be presented to the division officials in writing and they will make reply, in writing, within a reasonable time.

[fol. 168-41] ARTICLE 43

Durafion of agreement:

The rates, rules and working conditions as provided herein, shall be continued in effect, subject to thirty days' written notice my either party.

For the Louisville & Nashville Railroad, John Bose, Director of Personnel. For the Firemen and Hostlers, W. G. Metcalfe, General Chairman, Brotherhood of Locomotive Firemen and Enginemen.

[fol. 169] Original Exhibit No. I: which was attached to and made a part of the Substituted Amended Bill:

[Original Exhibit No. I is the same as Complainant's Exhibit "AA" attached to page 168.]

IN THE CIRCUIT COURT, TENTH JUDICIAL CIRCUIT OF ALABAMA,
IN EQUITY

THE STATE OF ALABAMA,
Jefferson County:

I, G. H. Boyd, Register of the Circuit Court, Tenth Judicial Circuit of Alabama, In Equity, do hereby certify that pages one and two of the Supplemental Transcript contains the original of the Exhibits "AA" and "One", which were ordered by the Court to be sent to the Clerk of the Supreme Court in order that same might be inspected personally by the Judges of the Supreme Court.

Witness my hand and seal of office, this the 24th day of June, 1943.

(Signed) G. H. Boyd, Register. (Seal.)

[fol. 170] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 171] IN THE SUPREME COURT OF THE UNITED STATES
STIPULATION GOVERNING PRINTING OF RECORD

The parties hereto stipulate that in printing the record the Clerk of the United States Supreme Court shall cause to be printed from the "Agreement between the Louisville & Nashville Railroad and its Locomotive Firemen and Hostlers", etc., issued March 1, 1929, the following sections only:

Heading, thru words "Issued March 1, 1929" p. 1.
Article 25, pp. 25-34.
Article 26, pp. 34-48.
Article 31, pp. 54-56.
Article 32, pp. 57-58.
Article 43, p. 65.
Signatures, p. 65.

Right is reserved by each party and to the Court to refer to the entire Agreement aforesaid, which has been filed

with and certified by the Supreme Court of Alabama as part of the record in this case.

Chas. H. Eyster & White E. Gibson, Counsel for Respondent Louisville & Nashville Railroad Company; John W. Lapsley, Counsel for Respondent Brotherhood of Locomotive Firemen & Enginemen.

Arthur D. Shores, Charles H. Houston, Joseph C. Waddy, Counsel for Petitioner.

March 27, 1944.

[fol. 172] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 29, 1944

The petition herein for a writ of certiorari to the Supreme Court of the State of Alabama is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

3. that Congress had left seniority rights as a matter of contract to the parties and the contract in question was lawful (R. 143; loc. cit. at pp. 419, 423).

4. that neither the Railroad nor the Brotherhood was guilty of fraud (R. 144; loc. cit. at pp. 420, 422).

5. that the restraints of the Fifth Amendment do not apply (R. 134; loc. cit. at p. 418).

Questions Presented.

1. Does the representative under the Railway Labor Act of an entire craft or class of firemen on a carrier have a duty to represent all members of the craft or class, including the minority firemen, fairly and impartially?

2. Are the grant of power by Congress to and the exercise of such power by the collective bargaining representative under the Railway Labor Act subject to the restraints of the Fifth Amendment to the United States Constitution?

3. Did the Notice of March 28, 1940, the Agreement of February 18, 1941 and Supplement of May 12, 1941 under the circumstances infringe petitioner's rights and deprive him of his property without due process of law as guaranteed him by the Fifth Amendment, and impose on him an economic servitude inconsistent with the Thirteenth Amendment?

Reasons for Granting the Writ.

1. There is a basic conflict between the decision of the United States Circuit Court of Appeals, Fourth Circuit, in a companion case (*Tunstall* v. *Brotherhood of Locomotive Firemen & Enginemen*, U. S. Supreme Court, October Term, 1943 No. 779) and the Alabama Supreme Court as to the effect of the decisions of the United States Supreme Court cited herein on p. 7, and in the record at p. 134.

2. There is no administrative tribunal or agency established under the Railway Labor Act with jurisdiction to

afford minority workers an opportunity to be heard and redress against wrongs and oppression by the majority workers who have seized the bargaining rights and grievance representation for the entire craft or class by virtue of the Railway Labor Act,

3. This case peremptorily calls for review by this Court to establish uniformity of operating conditions on interstate carriers as to the position of the craft representative under the Railway Labor Act, so that the rights and duties of the craft representative will not vary from state to state. For example, compare the present case with

Ledford v. *Chicago, M. & St. P. Ry. Co.*, 298 Ill. App. 298, 18 N. E. (2d) 568 (1939);

Piercy v. *Louisville & Nashville R. Co.*, 198 Ky. 477, 248 S. W. 1042 (1923, antedating the Act).

4. The questions presented are of paramount public interest as they affect not only Negro firemen but all minority workers in the railway industry, and consequently the whole condition of interstate commerce throughout the nation.

5. Unless this controversy is decided by the peaceable processes of the Courts it will lead to industrial warfare and paralysis of the war effort.

WHEREFORE petitioner prays that a writ of certiorari issue to review the judgment of the Alabama Supreme Court entered herein January 13, 1944, and that the Court reverse such judgment after hearing and consideration.

Respectfully submitted,

ARTHUR D. SHORES,
CHARLES H. HOUSTON,
Counsel for Petitioner.

JOSEPH C. WADDY,
Of Counsel.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Preliminary Statement.

We refer to the foregoing petition for a citation of the opinion below, statement of grounds of jurisdiction, citation of statute involved and a summary statement of the case.

We further ask that this case be considered along with its companion case, *Tunstall* v. *Brotherhood of Locomotive Firemen & Enginemen*, October Term, 1943, No. 779.

Specifications of Error.

The Alabama Supreme Court erred in holding

1. That the Railway Labor Act imposed no fiduciary duties on the collective bargaining representative as to the minority members of the craft, and that the representative can advance the interests of the majority at the expense of the minority.

2. That the grant of power by Congress under the Railway Labor Act to the representative designated by the majority to bargain collectively for the entire craft or class and the exercise of such power by the representative were not subject to the restraints of the Fifth Amendment to the United States Constitution.

3. That the Notice of March 28, 1940, the Agreement of February 18, 1941 and the Supplement of May 12, 1941 were lawful as respects petitioner.

4. That the Substituted Amended Complaint and supporting Exhibits did not state a cause of action.

Summary of Argument.

1. The Railway Labor Act imposes a duty on the representative under the Railway Labor Act of an entire craft or class of workers to represent all members of the craft fairly and impartially.

2. The grant of power by Congress under the Railway Labor Act to the representative designated by the majority to bargain collectively for the entire craft or class and the exercise of such power by the representative were subject to the restraints of the Fifth Amendment to the United States Constitution.

3. The Subsituted Amended Complaint stated a cause of action meriting all the relief prayed for.

4. The conflict of judicial opinion regarding the position of the craft representative under the Railway Labor Act needs to be reconciled.

ARGUMENT.

I.

The Railway Labor Act imposes a duty on the representative under the Railway Labor Act of an entire craft or class of workers to represent all members of the craft fairly and impartially.

The collective bargaining and grievance representative of an entire craft or class of workers under the Railway Labor Act is not the master but the servant of all the workers it represents.

E. g., see Section 1 (Sixth); Section 2; etc.

Every document in this case demonstrates the fact that both the Brotherhood and the Railroad recognize that the Brotherhood acts in the collective bargaining process as agent for the craft of firemen.

See:

Heading and signatures to the Firemen's Agreement issued March 1, 1929 (R. 146; 148);
Form of the Notice of March 28, 1940 (R. 59);
Form of the Agreement of February 18, 1941 (R. 13);
Form of the Supplemental Agreement of May 12, 1941 (R. 21).

The position taken by the Alabama Supreme Court that the representative has no duty toward the minority and can advance its own interests to the detriment of the minority has no support in the history of Federal Railway Labor legislation, the text of the Act, or precedents governing the position of a labor union as regards its own membership.

See:

Piercy v. *Louisville & Nashville R. Co., supra;*
Cameron v. *International Alliance,* 118 N. J. Eq. 11, 176 A. 697, 97 A. L. R. 592.

The position of the Alabama Supreme Court would permit the bargaining representative to establish a closed shop against the very text of the Act.

See:

Sec. 2—Fourth and Fifth
40 Opinions of the Attorney General, Op. 59.

In fact the position of the Alabama Supreme Court is so patently arbitrary and open to every objection raised by this Court in *Carter* v. *Carter Coal Co.*, 298 U. S. 238,

80 L. Ed. 1160 (1936), that extended argument is superfluous.

The contention of the Alabama Supreme Court that the action of the Brotherhood was in execution of traditional railroad practice of promoting only white firemen to the position of locomotive engineer and of making available more white promotable firemen for possible promotion to engineers does violence to the complaint and ignores all the supporting papers attached as Exhibits.

1. There is absolutely nothing to show that this Railroad, or any other Railroad, was suffering from a shortage of engineers when the Notice of March 28, 1940 was served by the Brotherhood or when the Agreement of February 18, 1941 or Supplement of May 12, 1941 was entered into, or that anybody anticipated any shortage. The Railroads had been obtaining sufficient engineers through all their history without curtailing the rights of Negro firemen as firemen as the Brotherhood proposed and insisted upon. The Railroads were not complaining. The Notice and the pressure proceeded from the Brotherhood for selfish reasons (R. 89).

2. The very terms of the Notice of March 28, 1940 show that the patent purpose of the Brotherhood was *complete elimination* of Negro firemen in the railroad industry. The Notice was not confined to the respondent Railroad but extended to the major lines operating in the Southeastern section of the United States, where employment of Negro firemen is chiefly concentrated (R. 60).

3. The Agreement of February 18, 1941 itself demonstrates the purpose of the Brotherhood: Employment of Negro firemen was cut to 50% on seniority districts where they were then working, they were barred absolutely from employment on any other seniority districts and the Broth-

erhood left its hands free to press for more onerous restrictions on use of Negro firemen on the individual carriers beyond the limitations imposed by the Agreement itself (R. 12-13).

4. The Brotherhood in the Supplement of May 12, 1941 grabbed the last fractional advantage over Negro firemen by providing that under the 50% restriction, promotable men (Brotherhood members) should always get the odd job (R. 13-21).

All of these facts the Alabama Court deliberately ignored, as well as the specific charges in the Substituted Amended Complaint that the purpose of the Brotherhood in the premises was to drive the Negro firemen out of employment and create a closed shop for its own membership; that it asserts exclusive grievance representation for the entire craft of firemen but refuses to represent the Negro firemen when their interests conflict with those of its own membership (R. 88). On demurrer these allegations must be taken as true.

The entire position of petitioner rests upon the relationship which Congress created between the collective bargaining and grievance representative and the members of the craft it represents under the Railway Labor Act. If Congress established a confidential relationship between the representative and the workers, and imposed fiduciary duties on the representative to represent all members of the craft impartially, petitioner has undoubtedly stated a cause of action. Since this is not an extensive brief on the merits, and since the argument that Congress did establish such a confidential relation and fiduciary duty on the representative has been made in the *Tunstall* case (See Petition and Brief. No. 779 *supra* pp 9-12), petitioner contents himself with referring to that argument and adopting it herein.

The nub of the whole matter is that the Alabama Supreme Court gagged on the possibility of promotion of Negro locomotive firemen to the position of engineer (R. 142; loc. cit. at p. 422). Although petitioner did not raise that question in this case, the Court itself conjured up the matter:

> "True, complainant in this particular case does not seek to be placed in the promotable class; that is, he does not seek to be declared in this suit eligible for the position of engineer. But our previous discussion discloses that a recognition of the principles for which he contends here will ultimately lead to that end. If the Brotherhood is his confidential agent, and must look to his interest, it must look to his promotion in the final analysis." (R. 142; loc. cit. at p. 422).

Petitioner is not seeking promotion but protection of his rights as a fireman; and he declines to permit the issue to be turned from that point.

II

The grant of power by Congress under the Railway Labor Act to the representative designated by the majority to bargain collectively for the entire craft or class and the exercise of such power by the representative were subject to the restraints of the Fifth Amendment to the United States Constitution.

Petitioner concedes that the restraints of the Fifth Amendment have not yet been applied to the actions of private individuals proceeding without reference to a grant of governmental authority.

See *Corrigan* v. *Buckley*, 271 U. S. 323, 70 L. ed. 969.

But that is not this case. The Brotherhood represents the entire craft or class of firemen on respondent Railroad not by mandate of the men themselves but solely by grant of power from Congress in the Railway Labor Act. The

Brotherhood is fastened on the Negroes against their consent and being in the minority they have no way of unloading the Brotherhood as their representative under the Railway Labor Act. Further Congress has set up no administrative machinery under the Railway Labor Act to deal with disputes between different classes of employees within a craft which do not involve the identity of the representative. No administrative machinery is established under the Act to supervise or check the conduct of the representative once chosen. Yet the effect of the grant of power by Congress to the Brotherhood as representative under the Act of the entire craft of firemen and the actual exercise of that power by the Brotherhood as sanctioned by the Alabama Supreme Court is to place the minority members' jobs at the absolute and unrestrained power of the representative. Such unbridled grant of power, with no guiding standards, would be an unconstitutional delegation of legislative power and deprivation of liberty and property without due process of law.

Carter v. *Carter Coal Co., supra.*

The question cannot be dismissed cavalierly, as the Alabama Supreme Court attempts to do, by suggesting that the Brotherhood is a private person (R. 134; loc. cit. at p. 418).

Nixon v. *Condon*, 286 U. S. 73, 88, 76 L. Ed. 984, 990:

> "The pith of the matter is simply this, that when those agencies are invested with an authority independent of the will of the association in whose name they undertake to speak, they become to that extent the organs of the State itself, the repositories of official power. • • • The test is whether they are to be classified as representatives of the State to such an extent and in such a sense that the great restraints of the Constitution set limits to their action." (loc. cit. at p. 88)

Here unless the grant of power is to violate both the Fifth and Thirteenth Amendments and place the Negro firemen in economic serfdom to the Brotherhood, the grant must be subject to constitutional restraints. It is unthinkable that Congress, itself the creature of representative government with limitations both written and implied, did not use the word *representative* in the Railway Labor Act in the sense of creating such representative the agent or servant of the workers it represents, with a duty to represent the entire craft impartially.

III.

The Substituted Amended Complaint stated a cause of action meriting all the relief prayed for.

It is to be noted that the Alabama Supreme Court did not raise any procedural questions in disposing of this case; but it did misread the facts and statements in the Substituted Amended Complaint and exhibits.

For example, it states: "There is no charge of bad faith or malice against the complainant or any of his class" on the part of the Brotherhood (R. 142; loc. cit. at p. 422). The complaint specifically charges the Brotherhood with being hostile and disloyal to the Negro firemen and details the particulars (R. 88). It specifically charges fraud and details the particulars (R. 88-93).

The Alabama Supreme Court concedes that an unlawful invasion or interference with seniority rights is actionable (R. 135; loc. cit. at p. 419), but finds the interference in the present case lawful.

The case returns to the point of beginning: the relationship between the craft representative under the Railway Labor Act and the members of the craft it represents. The Court concedes that if a confidential relationship and fiduciary duty have been created, the Brotherhood violates same by advancing its own interests at the expense of the minor-

ity (R. 142; loc. cit. at pp. 419-423). But it finds that "Congress in providing for collective bargaining by representative of a craft or class, had no intention of creating a confidential relationship of principal and agent" (R. 136; loc. cit. at p. 419).

Based on such relationship petitioner is entitled to all the relief sought:

1. Damages:

U. S. F. & G. Co. v. *Millonas*, 206 Ala. 147, 89 So. 732, 29 A. L. R. 520;
Farris v. *Dudley*, 78 Ala. 124.

2. Injunction:

Bankers Fire & Marine Ins. Co. v. *Sloss*, 229 Ala. 26, 155 So. 371;
Rogers v. *Brightman*, 189 Ala. 228, 66 So. 71 (1919);
Ledford v. *Chicago, M. & St. P. Ry. Co., supra;*
Piercy v. *L. & N. R. Co., supra.*

3. Discovery:

Shelton v. *Timmons*, 189 Ala. 289, 66 So. 9.

4. Declaratory judgment:

Ala. Code 1940, Title 7, Art. 12.

The cases cited by the Alabama Supreme Court to support its ruling that the Brotherhood had control over petitioner's seniority rights do not reach his situation. These cases hold that the representative can *incidentally* modify the seniority rights of individual workers "in the interests of all the members."

E. g. *Hartley* v. *Brotherhood of Ry. & S. S. Clerks*, 283 Mich. 201, 277 N. W. 885, 887 (cited by the Alabama Court R. 135, loc. cit. at p. 419).

But our case is one where the Brotherhood curtailed petitioner's seniority rights through hostility to petitioner and for the profit of its own members.

Cf. Ledford v. *Chicago, M. & St. P. Ry. Co., supra.*

This Court is not bound by the construction placed on the Substituted Amended Complaint by the Alabama Supreme Court. Where constitutional rights are claimed and the decision on the question of the right depends on the facts, this Court will make its own independent review and finding on the claim of discrimination.

Norris v. *Alabama*, 294 U. S. 587, 79 L. Ed. 1074.

IV.

The conflict of judicial opinion regarding the position of the craft representative under the Railway Labor Act needs to be reconciled.

The conflict of judicial opinion has already been noted: *cf. Ledford* v. *Chicago, M. & St. P. Ry. Co., supra*, with the instant case. Compare also the *Tunstall* case, No. 779, *supra*, with the instant case on the applicability of the three decisions of this Court above cited.

Certainly argument is unnecessary to demonstrate the need of review under such circumstances so that there may be uniformity of operating conditions in interstate commerce, and so that the collective bargaining representative will have the same rights and duties with respect to the craft or class of workers it represents along the entire mileage of the carrier.

Conclusion.

Repeatedly the efforts of the white firemen to drive the Negro firemen out of service have broken out in violence. The records are recorded in the Federal Archives; the tes-

timony was taken before the President's Committee on Fair Employment Practice in September, 1943; before the Select Committee of the House of Representatives to Investigate Executive Agencies (Smith Committee) in March, 1944. The seeds of industrial warfare which will adversely affect the war effort are present. It is paramount in the public interest that the rights and duties of the collective bargaining and grievance representative under the Railway Labor Act be determined peaceably by the Courts, since no other forum for hearing and determination of the problem exists (and a forum must be found to satisfy the requirements of due process—See *Poindexter* v. *Greenhow*, 114 U. S. 270, 29 L. Ed. 185) rather than risk the interruption to commerce and attendant evils by settling the question by violence.

Respectfully submitted,

ARTHUR D. SHORES,
CHARLES H. HOUSTON,
Counsel for Petitioner.

JOSEPH C. WADDY,
Of Counsel.

APPENDIX

Brotherhood of Locomotive Firemen and Enginemen

General Grievance Committee

—— Railway,
March 28, 1940.

Mr. —— ——.

Dear Sir:

This is to advise that the employees of the —— Railway engaged in service, represented and legislated for by the Brotherhood of Locomotive Firemen and Enginemen, have approved the presentation of request for the establishment of rules governing the employment and assignment of locomotive firemen and helpers, as follows:

1. Only promotable men will be employed for service as locomotive firemen or for service as helpers on other than steam power.

2. When new runs or jobs are established in any service, only promotable firemen or helpers will be assigned to them.

3. When permanent vacancies occur on established runs or jobs in any service, only promotable firemen or helpers will be assigned to them.

4. It is understood that promotable firemen or helpers on other than steam power are those in line for promotion under the present rules and practices to the position of locomotive engineer.

In accordance with the terms of our present agreement, and in conformity with the provisions of the Railway Labor Act kindly accept this as the required official notice of our desire to revise the agreement to the extent indicated.

The same request is this date being presented on the following railroads.

Atlantic Coast Line.
Jacksonville Terminal.
Atlanta Joint Terminal.
Atlanta & West Point.

Western Railroad of Ala.
Central of Georgia.
Frankfort & Cincinnati.
Georgia Railroad.
Georgia & Florida.
Gulf, Mobile & Northern.
Louisville & Nashville.
Memphis Union Station Co.
Louisiana and Arkansas.
Mobile and Ohio, Columbus & Greenville.
Norfolk and Portsmouth Belt.
Norfolk & Southern.
Norfolk & Western.
Seaboard Airline.
Southern Railroad System.
St. Louis-San Francisco.
Tennessee Central.

It is our request that all lines or division of railway controlled by the —— Railway shall be included in settlement of this proposal and that any agreement reached shall apply to all alike on such lines or divisions.

It is desired that reply to our proposal be made in writing to the undersigned on or before April 7, concurring therein, or fixing a date within 30 days from date of this letter when conference with you may be had for the purpose of discussing the proposal. In event settlement is not reached in conference, it is suggested that this railroad join with others in authorizing a conference committee to represent them in dealing with this subject. In submitting this proposal we desire that it be understood that all rules and conditions in our agreements not specifically affected by our proposition, shall remain unchanged subject to change in the future by negotiations between the proper representatives as has been the same in the past.

Yours truly,

(Signed) —— ——,
General Chairman.

Agreement.

Between

The Southeastern Carriers' Conference Committee, Representing the Atlantic Coast Line Railway Company.

Atlanta and West Point Railroad Company Western Railway of Alabama.

Atlanta Joint Terminals.

Central of Georgia Railway Company.

Georgia Railroad.

Jacksonville Terminal Company.

Louisville and Nashville Railroad Company.

Norfolk and Portsmouth Belt Line Railroad Company.

Norfolk Southern Railroad Company.

St. Louis San Francisco Railroad Company.

Seaboard Air Line Railway Company.

Southern Railway Company (including State University Railroad Company and Northern Alabama Railway Company).

The Cincinnati, New Orleans and Texas Pacific Railway Company.

The Alabama Great Southern Railroad Company (including Woodstock and Blocton Railway Company and Belt Railway Company of Chattanooga).

New Orleans and Northeastern Railroad Company.

New Orleans Terminal Company.

Georgia Southern and Florida Railway Company.

St. John River Terminal Company.

Harriman and Northeastern Railroad Company.

Cincinnati, Burnside and Cumberland River Railway Company.

Tennessee Central Railway Company and the Brotherhood of Locomotive Firemen and Enginemen.

(1) On each railroad party hereto the proportion of non-promotable firemen, and helpers on other than steam power, shall not exceed fifty per cent in each class of service established as such on each individual carrier. This agreement

does not sanction the employment of non-promotable men on any seniority district on which non-promotable men are not now employed.

(2) The above percentage shall be reached as follows:

(a) Until such percentage is reached on any seniority district only promotable men will be hired.

(b) Until such percentage is reached on any seniority district all new runs and all vacancies created by death, dismissal, resignation or disqualification shall be filled by promotable men. A change in the starting time of the same run or job will not be considered as constituting a new run.

(3) Except as provided in items (2) (a) and (2) (b) men now holding seniority as firemen, or helpers on other than steam power, shall be permitted to exercise seniority in accordance with their seniority and the rules of their respective schedules.

(4) It is understood that promotable firemen, or helpers on other than steam power, are those who are in line for promotion under the present rules and practices to the position of locomotive engineers.

(5) It is understood and agreed that on any road having, in the opinion of its B. of L. F. and E. Committee, more favorable rules or conditions than above stipulated, such rules and conditions may at the option of such committee be retained in lieu of the above provisions.

(6) All persons hereafter hired as firemen shall be required in addition to showing in the opinion of management, reasonable proficiency, to take within stated periods to be fixed by management, but in no event to extend over a period of more than three years, two examinations to be prepared by management and to be applied to all alike to test their qualifications as firemen. A fireman failing to pass either examination shall have a second trial within three months.

Firemen hereafter hired declining to take or failing to pass either of the examinations provided for in the preceding paragraph shall be dropped from the service.

Promotable firemen who pass the two examinations above referred to shall be required to take an examination for promotion to the position of engineer when they have had three and not more than four years of actual service. Upon passing such promotional examination and meeting all the requirements established by the carrier for the position of engineer, they shall, when there is need for additional engineers, be promoted to such position, and will establish a seniority date as engineer in accordance with the rules contained in the agreements on the individual railroads.

When rules for conduct of examination for promotion are included in current schedules, such rules shall apply. In the absence of such rules firemen failing to pass will be given a second trial within a perod of three months and if they fail to pass on the second trial will be given a third trial within a period of three months.

Promotable firemen declining to take examinations for promotion, or who fail in their efforts to successfully pass the same, shall be dropped from service.

All promotable firemen now in the service physically qualified, who have not heretofore been called for examination for promotion, or who have not waived promotion, shall be called in their turn for promotion. When so called should they decline to take such examinations for promotion or fail to pass as herein provided they shall be dropped from the service.

(7) It is expressly understood that in making this agreement representatives of the employees do not waive and are in no way prejudiced in the right to request agreements on the individual carriers here represented which will restrict the employment of helpers on other than steam power to promotable men; and it is agreed that this question is to be negotiated to a conclusion with the individual carrers.

(8) Ths agreement shall become effective February 22, 1941.

Signed at Washington, D. C., this 18th day of February, 1941.

For the Employees:

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN,
D. B. ROBERTSON,
President.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN'S COMMITTEE,
W. O. METCALFE,
Chairman.

For the Carriers:

SOUTHEASTERN CARRIER CONFERENCE COMMITTEE,
C. D. MACKAY,
Chairman.

C. D. MACKAY,
H. A. BENTON,
C. G. SIBLEY,
Committee Members.

Supplemental Agreement.

Agreement in connection with application on the L. & N. Railroad of Agreement between the Southeastern Carriers Conference and the Brotherhood of Locomotive Firemen and Enginemen, dated Washington, D. C., February 18, 1941, to become effective February 22, 1941, regarding the employment and the assignment of firemen, as agreed by

Mr. W. B. Porter, Asst. Director of Personnel
Mr. G. C. Howard, Asst. Director of Personnel

Representing the L. & N. Railroad, and

Mr. W. C. Metcalfe, General Chairman

1. Q. What constitutes a new run under Article 2 (b) of the agreement above mentioned?

A. When it is changed to the extent that it is operated out of different terminals, the mileage lengthened or shortened to the extent of 20 miles per day, or the scheduled compensation on runs paid under Article 3, Section (a), of the general Agreement, changed to the equivalent of 20 miles per day, when a run is operated six days per week instead of seven, or vice versa, and new run hereafter inaugurated or any run discontinued and thereafter reestablished. (See Article 25, Sections 12 and 13.)

In yard service it is understood that a new job is when a job is changed from a six day job to a seven day job, or from a seven day job to a six day job, or where the point for going on duty or being relieved is permanently changed as such as one-half mile, and any job hereafter inaugurated or any job discontinued and thereafter rebulletined. Changing the off day without changing the number of days worked per week would not constitute a new job. (See Art. 25, Sections 12 and 13.)

Adjusting Pool Boards

2. Q. In the matter of increasing first and second pool boards, where such pools are maintained, would the addition of one or more men to such pools be considered as

a new job in the purview of Article 2(b) of the above mentioned agreement?

A. Yes.

3. Q. In making reduction in the number of men in either the first or second pool, how would these reductions be made as regards promotable and non-promotable firemen?

A. Seniority will govern provided the percentage of promotable firemen will not reduce when such percentage is 50 or below.

For example:

If the first pool firemen's board were increased from ten to twelve men, there being six non-promotable and four promotable men in that board, two promotable firemen should be added to bring the board up to twelve, or 50 per cent.

If a reduction were made in such board from twelve to ten or two men were to be cut off, one promotable and one non-promotable firemen would be cut off, provided the two junior firemen were promotable, but if three instead of two men were cut from the board, then one promotable and the two junior non-promotable men would come off.

To further illustrate: If in second pool there were 25 promotable and one non-promotable firemen and it was necessary to cut the board five men, the one non-promotable fireman would be allowed to remain in the pool provided he had seniority over the five promotable men cut off.

To again illustrate: If the first pool had ten non-promotable and two promotable firemen and the pool had to be reduced for men, or to sixteen. In the event non-promotable men had seniority over the promotable men, the promotable men would be cut off to the extent of reducing and maintaining the ratio 50-50. If there were six promotable and six non-promotable men in the pool, and it were necessary to cut two men off, the two junior firemen being non-promotable, they would be cut off under the seniority rules.

Passenger Service.

Examples.

4. Q. There are three groups of passenger runs, two firemen being assigned to each group—a total of six men, all non-promotable. Each fireman is required to lose three round trips per month account of mileage regulations. Their runs are grouped together and seven firemen assigned to protect them in lieu of the gouge, working first in, first out. Under Article 26, Section 22, the six runs would be advertised.

How should assignments be made?

A. In the event the mileage of the six non-promotable firemen was not decreased to the extent of twenty miles per day, or the equivalent of twenty miles per day, these six men could not be disturbed, except under seniority rules. However, the senior promotable firemen bidding as the 7th man in the pool, would be assigned to the job.

5. Q. In the event the mileage or the equivalent thereof is decreased twenty miles per day, how would assignments then be made?

A. On seniority except that non-promotable firemen could not be assigned to more than 50% of the jobs.

6. Q. Should these same runs later be changed and six crew reassigned as formerly, the 7th job being cut off, how should assignments then be made?

A. Senior applicants should be assigned.

7. Q. How should assignments be made, when the ratio of nonpromotable to promotable firemen is 6 and 4, and a new run is added, requiring

(A) 1 additional fireman? Ans. Senior promotable fireman should be assigned.

(B) 2 additional firemen? Ans. Two senior promotable firemen should be assigned.

(C) 3 additional firemen? Ans. Three senior promotable firemen should be assigned.

8. Q. Should another run be added requiring one fireman after the ratio has reached 6 non-promotable and 7 promotable firemen, how should assignments be made?

A. As the ratio of non-promotable to promotable is less than 50%, the senior applicant would be assigned whether non-promotable or promotable.

9. Q. In passenger service the ratio of non-promotable to promotable firemen stand 5 to 4. In this class there is a group of 3 passenger runs manned by four non-promotable and two promotable firemen. A new run is added to this group requiring two men and the entire group of runs is advertised, how should assignments be made?

A. Two promotable senior firemen should be assigned to the group.

10. Q. With the ratio in this class standing 6 and 6 "A" one of the promotable firemen is assigned as engineer. How should this vacancy be filled?

A. By senior promotable firemen.

11. Q. When "A" is cut off as engineer, to what run is he entitled?

A. To any run held by a junior fireman, either promotable or non-promotable.

12. Q. Should "A" displace a junior promotable fireman in this class, how should the lafter be governed?

A. He should displace any junior fireman.

13. Q. If "A" displaces a junior non-promotable fireman in this class, how should the latter be governed?

A. He could exercise his seniority over any junior non-promotable firemen provided that in doing so the non-promotable firemen should not be assigned to more than 50% of any class of service.

14. Q. The ratio in passenger service is 50-50. There are four runs one of which is discontinued and the remaining three runs in the group are readvertised for six men. How should assignment be made?

A. To the senior applicant unless so doing the ratio of non-promotable firemen would exceed 50%, in which event

sufficient promotable junior firemen should be assigned to prevent non-promotable firemen exceeding 50%.

15. Q. The ratio of non-promotable to promotable firemen in passenger service is 5 and 8. A new run is added, requiring:

(A) Two men
(B) Three men
(C) Four men

How should assignments be made?

A. (A) Senior applicants would be assigned.
(B) Senior applicants would be assigned.
(C) Senior applicants would be assigned, unless by so doing the ratio of non-promotable to promotable firemen would thereby exceed 50%, in which event sufficient junior promotable firemen would be assigned to avoid this.

Assigned Through Freight Service.

16. Q. The ratio of non-promotable to promotable firemen is 8 and 5. One of the non-promotable firemen gives up his run and takes pool service, how should his vacancy be filled?

A. By the senior applicant.

17. Q. Should the senior applicant be promotable fireman in the same class, how should this vacancy be filled?

A. By the senior applicant.

18. Q. The ratio of non-promotable to promotable firemen is 7 and 5. A non-promotable fireman dies, is discharged, resigns, or is disqualified, how should this vacancy be filled?

A. By the senior applicant. (promotable)

19. Q. The ratio of non-promotable firemen is 5 and 7. A non-promotable fireman dies, is resigned, or is discharged, how should his place be filled?

A. By the senior applicant.

20. Q. The ratio of non-promotable to promotable firemen is 6 and 6. A new run is added requiring two men, how should the assignment be made?

A. By the senior applicant unless both are non-promotable firemen, in which event the senior promotable fireman and senior non-promotable fireman should be assigned.

21. Q. The ratio of non-promotable firemen to promotable firemen is 6 and 6. A new run is added requiring three men, how should assignments be made?

A. The senior applicant, unless they are all non-promotable firemen in which event one senior non-promotable and two senior promotable firemen will be assigned.

First Pool.

22. Q. The ratio of non-promotable to promotable firemen in first pool is 6 and 4. At the adjustment period, two men are added to the pool. How should assignments be made?

A. The two senior promotable applicants should be added.

23. Q. The ratio of non-promotable firemen to promotable firemen in the first pool is 6 and 4. At the adjustment period two men are to be taken out of pool. Should non-promotable or promotable men be taken out?

A. The two junior non-promotable firemen should be taken out of the pool.

24. Q. The ratio of non-promotable firemen to promotable firemen in first pool is 6 and 6. At adjustment period two men are to be taken out. Should non-promotable or promotable men be taken out?

(A) Two junior men being non-promotable

(B) Two junior men being promotable

(C) One of the junior men being non-promotable and one being promotable?

A. (A) Seniority would govern and the two junior men would be taken out of the pool.

(B) The junior promotable and the junior non-promotable would be taken out of the pool.

(C) Seniority would govern.

25. Q. With the same ratio under same circumstances as outlined next above, three men are to be taken out of the pool:

(A) The three junior men being non-promotable.

(B) The three junior men being promotable.

(C) The two junior men being non-promotable and the next junior man promotable.

A. (A) Seniority would govern.

(B) One junior promotable man and the two junior non-promotable men would be taken out.

(C) Seniority would govern.

Q. (D) The two junior men being promotable and two next junior men being non-promotable.

A. (D) The junior promotable man and two junior non-promotable men.

26. Q. When "A" is cut off as engineer, how should he place himself?

A. He may displace any junior fireman.

27. Q. The ratio of promotable and non-promotable firemen is 6 and 6. "A" is assigned as engineer, how should his vacancy be filled?

A. By senior promotable fireman.

28. Q. The ratio of non-promotable to promotable firemen in first pool is 7 and 6. "A" is assigned as engineer. How should his vacancy be filled?

A. By senior promotable applicant.

29. Q. "A" is later cut off as engineer. How should he place himself?

A. He may displace any junior fireman.

30. Q. The ratio of non-promotable to promotable firemen in second pool is 6 and 6. The first pool at adjustment period is reduced two men, resulting in displacement of two men in second pool? Who should be displaced?

(a) If the two junior men in second pool were promotable men?

(b) If the two junior men in second pool were non-promotable men?